

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

TERM, 1893.

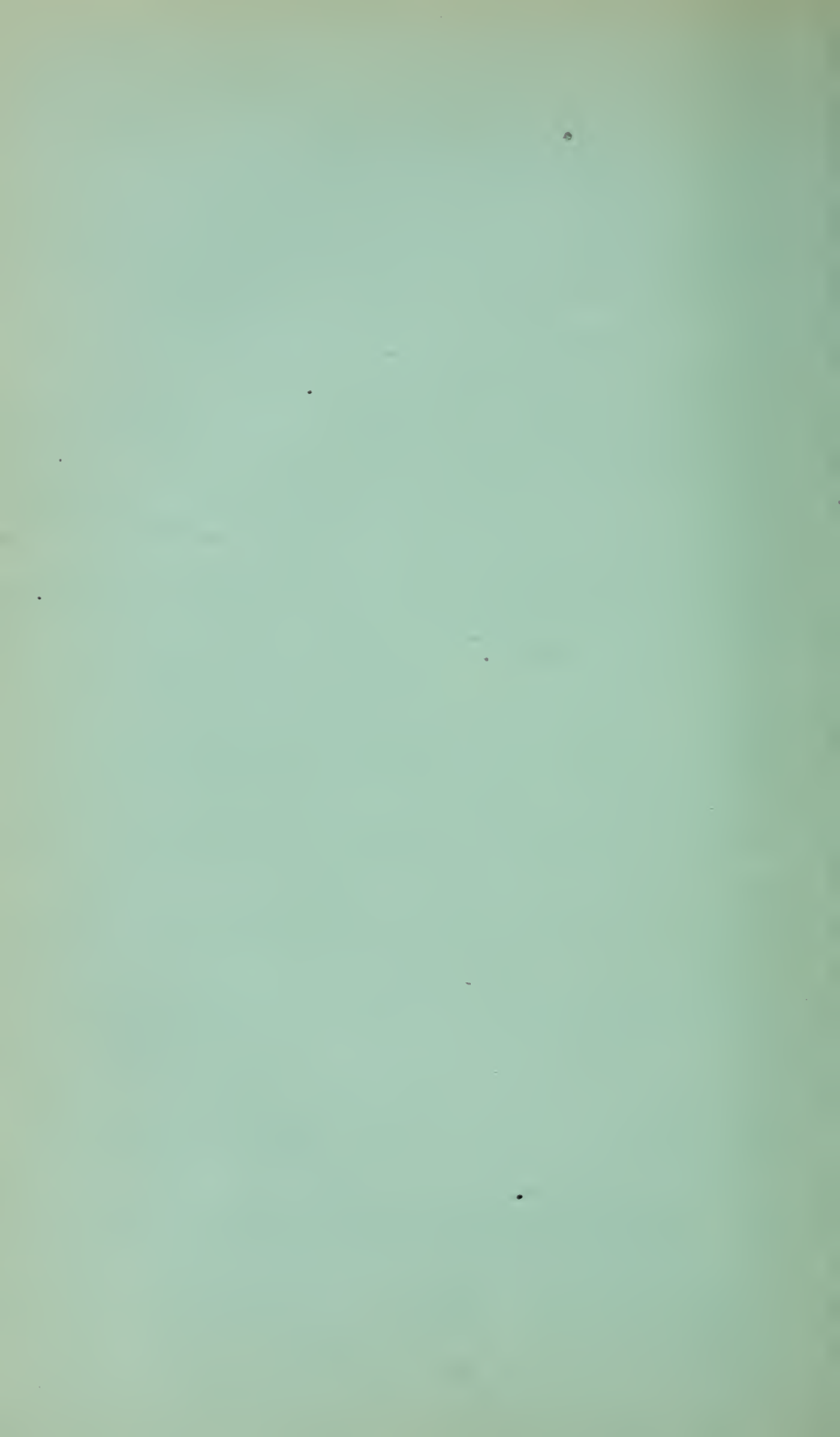
NO. 96

A. A. WENHAM, *Appellant*,
vs.
WILLIAM S. SWITZER, *Respondent*. }

APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA.

C. K. Wells Co., Printers, Helena, Mont.

FILED
APR -4 1893



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FOR THE NINTH CIRCUIT.

..... TERM, 1893.

NO.

A. A. WENHAM, *Appellant*,
 vs.
WILLIAM S. SWITZER, *Respondent.* }

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IN THE UNITED STATES CIRCUIT COURT, NINTH CIRCUIT,
FOR THE DISTRICT OF MONTANA.

A. A. WENHAM, *Plaintiff*, }
 vs. } CITATION ON APPEAL.
W. S. SWITZER, *Defendant*. }

United States Marshal's Office, }
State of Montana. }

To W. S. Switzer, Defendant, and to Aaron H. Nelson, Solicitor and
Counsel for Defendant :

You are hereby cited and admonished to be and appear at a
United States Circuit Court of Appeals for the Ninth Circuit, to be
holden at the City of San Francisco, in the State of California, in the
Ninth Circuit of the United States, on the 16th day of January, A.
D. 1893, pursuant to an appeal sued out and filed in the Clerk's
office of the Circuit Court of the United States for the District of
Montana, wherein A. A. Wenham is Plaintiff and Appellant, and
W. S. Switzer is Defendant and Appellee, to show cause, if any there
be, why judgment in said appeal mentioned should not be corrected
and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of
[SEAL.] the United States, this the 17th day of December, A. D.
1892.

HIRAM KNOWLES,
U. S. District Judge, Presiding.

Copy of the within and foregoing citation received this 17th day
of Decemb r, A. D. 1892, and due and lawful service of the forego-
ing citation and appeal, mentioned therein, is accepted and acknowl-
edged at Helena, Lewis and Clarke County, State of Montana, this
December 17th, A. D. 1892.

AARON H. NELSON,
Attorney and Solicitor for the Defendant, W. S. Switzer.

Endorsements :—No. 60 : In United States Circuit Court, Dis-
trict of Montana, A. A. Wenham, Plaintiff, *vs.* W. S. Switzer, De-
fendant. Citation on Appeal. Filed Dec. 19, 1892. Geo. W.
Sproule, Clerk. Word, Smith & Word, Solicitors for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, in and for
the District of Montana.

A. A. Wenham, *Complainant*, }
 vs. }
W. S. Switzer, *Defendant*. }

Be It Remembered, That on the first day of July, 1890, Complainant filed his bill of complaint in this action, which said Bill of Complaint is in words and figures following, to-wit :

In the United States Circuit Court for the District of Montana.

A. A. Wenham, *Plaintiff*, }
 vs. }
William S. Switzer, *Defendant*. }

To the Honorable the Judges of the United States Circuit Court for
the District of Montana, Ninth Circuit :

A. A. Wenham, who is a resident and citizen of the city of Cleveland, in the State of Ohio, brings this bill against William S. Switzer, who is a resident and citizen of the city of Butte, in the State of Montana, and thereupon your orator complains and says that about the month of April, 1888, the said William S. Switzer and your orator, the plaintiff herein, made and entered into a contract by the terms and conditions of which the said William S. Switzer was, and it was agreed by and between the said parties that he, the said William S. Switzer, was to purchase the following described lode mining property, situated and being in Summit Valley Mining District, in the County of Silver Bow, and State of Montana, and being that certain lode mining claim located and recorded in the books of records of lode mining claims in the said County of Silver Bow, as the "Burner" lode claim, and which said claim being designated as lot number two hundred and fifty-eight, by the United States Mineral Survey, and in Township three, north of range seven west of the Montana Meridian, and being designated as survey No. seventeen hundred and seventy four, and being bounded on the north by the Alta lode claim, and on the east by the Homestake lode claim, and on the south by the Silver Crown lode claim.

Your orator further represents that the said William S. Switzer was at the said time residing at the said city of Butte, in the State of Montana, and that your orator was at said time residing in the said city of Cleveland, State of Ohio, and that the said Switzer had the sole management of the negotiations for the purchase of the said property above described, and so agreed to purchase the same for the joint benefit of, and for your orator, this plaintiff, and him, the said Switzer, and that each were to have an undivided half interest in the same, and that at the said time it was not known for what

price the said property could be had, and what sum it would cost, and that at the said time your orator paid and advanced to the said Switzer on account of the said purchase, and for a portion of the purchase price thereof, and which was to be applied on the purchase of the said property, as a portion of the share of your orator therefor the sum of five hundred dollars, and which said sum the said Switzer received for such purpose.

Your orator further shows, that afterwards, to-wit, about the month of May, 1888, he, the said William S. Switzer, represented to him, your orator, that the said property could be bought for the sum of three thousand dollars, and that the half of your orator would cost fifteen hundred dollars, and that he, your orator, paid to the said Switzer the further sum of one thousand dollars on the purchase of the said property.

Your orator further shows and represents that afterwards, to-wit, about the month of June, 1888, the said Switzer purchased the said property above described and represented to your orator that he had paid the sum of four thousand dollars therefor, and that the interest which your orator would be entitled to would cost, and the same would be two thousand dollars, and that there was and would be a balance due on the same from your orator in the sum of five hundred dollars.

Your orator further shows and represents that the said William S. Switzer, in the purchase of said property above described, as aforesaid, took the title to the same in his own name and the whole thereof, and not in the name of himself and your orator, as by right of your orator he should have done.

Your orator further shows and represents that he has paid to the said William S. Switzer on the purchase of the said property the sum of one thousand and five hundred dollars, and that he had tendered to him, the said William S. Switzer, the further sum of five hundred dollars, and interest thereon at the rate of ten per cent per annum from the time the said Switzer purchased the said property and paid for the same to the time of the said tender, and that he, your orator, at the said time of making the said tender presented to him, the said Switzer, a deed for him to sign and execute to your orator, conveying to your orator an undivided one-half interest in and to the said property above described, but so it was, that he, the said Switzer, refused to sign and execute the same, and has failed to convey the said interest in the said property to your orator, but retains the same and said property to his sole use and benefit.

Your orator would further show and represent, he is now, and has been at all times, and now is ready and willing to make said payment of said sum of five hundred dollars with all interest on the same to the said Switzer.

Wherefore your orator prays that a subpoena be issued to the said William S. Switzer, requiring him to appear in said Court and answer this the Bill of Complaint of your orator at such time as is required by the rules and practices of the Court.

And your orator further prays that the said William S. Switzer be compelled by the decree and order of the Court to accept the said sum of money above named as part of the purchase price of the said above described property, and to convey, to make and execute to your orator a good and sufficient deed to the said property, to-wit, an undivided one-half thereof, and that he, your orator have such other and further relief as to the Court may seem meet and equitable in the premises, and costs of suit in this behalf expended.

ROBINSON & STAPLETON,
Solicitors for Complainant.

Endorsed :—No. 60. U. S. Circuit Court, District of Montana. A. A. Wenham vs. Wm. S. Switzer. Bill of Complaint. Filed July 1st, 1890. Geo. W. Sproule, Clerk. Robinson & Stapleton, Solicitors for Complainant.

And on the same day, to-wit, the 1st day of July, 1890, a chancery subpoena was issued out of this court, in the words and figures following, viz :

Circuit Court of the United States,
Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States—GREETING :

To William S. Switzer.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the court room in Helena, on the 4th day of August, A. D. 1890, to answer a bill of complaint exhibited against you in said court by A. A. Wenham, who is a citizen of the State of Ohio: and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of [SEAL.] July, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the 114th.

GEO. W. SPROULE, Clerk.

Memorandum pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above

suit on or before the first Monday of August next, at the Clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

GEO. W. SPROULE, Clerk.

To which said chancery subpoena the Marshal attached his return of service, which is in the words and figures following, to-wit:

MARSHAL'S RETURN.

United States Marshal's Office,)
District of Montana. }

I HEREBY CERTIFY, That I received the within writ on the 1st day of July, 1890, and personally served the same on the 2d day of July, 1890, by delivering to and leaving with William S. Switzer, said defendant named therein, personally, at the County of Silver Bow, in said District. an attached copy thereof.

WILLIAM F. FURAY, U. S. Marshal.

Helena, July 5, 1890.

150 miles @ 5c.,	-	\$ 7 50
3 meals,	- - -	2 25
Lodging,	- - -	1 00
Service,	- - -	2 00
		<hr/>
		\$12 00

Endorsed: (Title of Court and Cause.) Filed July 10, 1890.
Geo. W. Sproule, Clerk.

And afterward, to-wit, on the 25th day of July, 1890, upon a praecipe being filed, the appearance of the defendant herein named was entered as follows:

A. A. Wenham vs. William S. Switzer.

The appearance of defendant Wm. S. Switzer in the above entitled action, as also the appearance of A. H. Nelson, Esq., as solicitor for said defendant, is hereby entered this 25th day of July, 1890.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit, on the 3d day of September, 1890, defendant filed his demurrer herein, which is the words and figures following:

In the United States Circuit Court for the District of Montana.

A. A. Wennam, *Plaintiff*,)
vs.)
William S. Switzer, *Defendant*. }

To the Honorable, the Judges of the United States Circuit Court for the District of Montana, Ninth Circuit:

William S. Switzer, defendant in the above entitled cause.

demurs to plaintiff's complaint as filed therein, and upon the following ground, to-wit:

That said complaint does not state facts sufficient to constitute a cause of action.

A. H. NELSON,
Solicitor for Defendant.

I hereby certify that in my opinion the demurrer as entered above is well founded in law, and that the same is not interposed merely for the purpose of delay.

A. H. NELSON.

United States of America, }
District of Montana. }

William S. Switzer, defendant in the above entitled cause, deing duly sworn, deposes and says that he has read the foregoing demurrer, and believes the same to be well taken in law, and that it is not interposed merely for the sake of delay.

WILLIAM S. SWITZER.

Subscribed and sworn to before me this 3d day of September, A. D. 1890.
GEO. W. SPROULE,
Clerk U. S. Circuit Court, Ninth Circuit, Dist. of Montana.

Endorsed: (Title of Court and Cause.) Filed September 3, 1890. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 13th day of November, 1890, said demurrer by agreement of counsel was submitted to the Court, upon briefs to be filed.

And thereafter, on the 15th day of January, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

A. A. Wenham vs. Wm. S. Switzer.

This cause heretofore argued, and submitted to the Court for consideration and decision, upon the demurrer of defendant, to the complaint of plaintiff herein having been duly considered, *It is ordered* that said demurrer be and the same hereby is overruled.

It is further ordered that defendant have until Feb. 2, 1891, to file his answer.

And thereafter, to-wit, on the 2d day of February, 1891, defendant filed his answer herein, which said answer is in the words and figures following, to-wit:

In the United States Circuit for the District of Montana.

A. A. Wenham, <i>Plaintiff.</i>	} In Equity.
vs.	
William S. Switzer, <i>Defendant.</i>	

Answer of the above named defendant to the Bill of Complaint of the above named plaintiff.

In answer to the said bill, I, William S. Switzer, say as follows:

First:—I do not know that A. A. Wenham, the complainant herein is a resident and a citizen of the city of Cleveland, in the State of Ohio, but I believe such to be the fact.

Second:—I admit that I, the defendant herein, am a resident and a citizen of the city of Butte, in the State of Montana.

Third:—I deny that about the month of April, 1888, or at any other time, I entered into a contract with the said A. A. Wenham, the complainant herein, by the terms and conditions whereof, it was agreed that I was to purchase the mining property known as the "Burner" lode claim and described in said Bill of Complaint as follows, to-wit: Situated and being in Summit Valley Mining District in the County of Silver Bow and State of Montana, and being that certain lode mining claim located and recorded in the book of Records of lode mining claims in the said county of Silver Bow as the "Burner" lode claim, and on which said claim being designated as lot number two hundred and fifty-eight by the United States Mineral Survey and in township three, north of range seven, west of the Montana meridian, and being designated as survey No. seventeen hundred and seventy-four, and being bounded on the north by the Alta Lode Claim, and on the east by the Homestake Lode Claim, and on the south by the Silver Crown Lode Claim.

Fourth:—I admit that at said time, to-wit: About the month of April, 1888, I was residing in the said city of Butte in the State of Montana, and I believe that the said A. A. Wenham, the complainant, was at the time residing in the city of Cleveland, in the State of Ohio; but I deny that at said time or at any other time I had the sole or joint management of any negotiation for the purchase of the above described mining property known as the "Burner" claim for the joint benefit of the said complainant A. A. Wenham and myself, the said defendant, so that each of us was to have an undivided half interest in said claim; and I further deny that at said time, to-wit, about April, 1888, or at any other time, the said A. A. Wenham, the complainant herein, paid to me the sum of Five Hundred Dollars, or that I received from him, the said A. A. Wenham at said time or at any other time the sum of Five Hundred Dollars, on account of the purchase of the said mining property or

as a portion of the share of the said A. A. Wenham in said property to be purchased under the terms of said alleged contract.

Fifth:—I deny that about the month of May, 1888, I represented to the said A. A. Wenham that the said mining property could be bought for the sum of Three Thousand Dollars, or that the half thereof would cost him Fifteen Hundred Dollars, and I further deny that the said A. A. Wenham, the complainant herein, paid me the further sum of One Thousand Dollars on account of said property to be purchased by me for the joint benefit of said A. A. Wenham and myself under said alleged contract.

Sixth:—I admit that about the month of June, 1888, I purchased the said mining property, known as the "Burner" lode claim and paid therefor entirely with money of my own, and not in whole nor in part with any money paid or advanced to me by the said A. A. Wenham at any time or for any purpose whatsoever.

Seventh:—I admit that in the month of June, 1888, to-wit: about the fifth day of said month, I advised the said A. A. Wenham that I had purchased the said mining property, that it had cost me about four thousand dollars, and that I had taken a deed therefor in my own name; but I deny that at said time or at any other time, I represented to said A. A. Wenham that he was entitled to any interest in said claim, or that the cost of said interest would be two thousand dollars. And I further deny that about the month of June, 1888, or at any other time, I represented to A. A. Wenham that there was, or that there would be a balance of five hundred dollars or of any other sum due me on account of such alleged interest of the said A. A. Wenham in said mining property.

Eighth:—I deny that the purchasing of said mining claim and the taking of the title thereto in my own name was in violation of any rights of the said A. A. Wenham to or in said mining claim, or to the title thereto, either in whole or in part.

Ninth:—I deny that the said A. A. Wenham, complainant herein, has paid to me the sum of fifteen hundred dollars on account of the purchase price of said property, and under the terms of said alleged contract, as in complainant's bill alleged.

Tenth:—I admit that on or about the month of December, 1889, the said A. A. Wenham by his solicitors, Robinson & Stapleton of the city of Butte, and State of Montana, tendered me the sum of five hundred dollars, with interest thereon from some date unknown to me, and I further admit that at the same time the same parties, to-wit, Robinson & Stapleton, presented to me a deed purporting to convey to the said A. A. Wenham an undivided half interest on said "Burner" lode claim, and requested my signature thereto, and I admit

that I refused to sign or execute said deed and have ever since refused to sign or execute the same.

Eleventh:—I admit that when about the fifth day of June, 1888, I advised the said A. A. Wenham that I had purchased said mining property, and that the same had cost me about four thousand dollars, and that I had taken a deed therefor in my own name. I advised him that I would sell him an undivided one-half interest in said claim for the sum of two thousand dollars. I admit that at that time there was in my hands five hundred dollars belonging to the said A. A. Wenham, and subject to his order, and that I advised him, the said A. A. Wenham, that if he would pay me the further sum of fifteen hundred dollars I would deed to him an undivided half interest in said mining property; that shortly after said fifth day of June, 1888, but about said month of June, 1888, I further advised said A. A. Wenham that the said payment of fifteen hundred dollars must be within thirty days of the date of my said agreement to deed him an undivided one-half interest in said mining property for the sum of two thousand dollars, and that in default of such payment within the time so limited, said agreement would be null and void. But the said A. A. Wenham made no payment under said agreement, and within the time so specified, nor at any other time prior to April, 1889, being ten months after the expiration of the full period within which my said offer of sale of June, 1888, was open to acceptance by said A. A. Wenham: that about the month of April, 1889, the said A. A. Wenham tendered me on account of said offer of sale a draft for one thousand dollars, said draft being as follows: No. 139,281, dated April 26th, 1889, drawn by the First National Bank of Cleveland, Ohio, upon the Central National Bank of New York City, payable to the order of A. A. Wenham, and endorsed in blank A. A. Wenham, but that I refused to accept the said draft as payment on account of said offer, but advised him, the said A. A. Wenham, that I held said draft, as also the five hundred dollars, in my hands and belonging to him, subject to his order, and draft and five hundred dollars has ever since and is now so held by me.

Twelfth:—Wherefore and under the circumstances herinbefore appearing, I submit that the prayer of complainant herein, that by decree and order of this Court I be compelled to accept the said sum of five hundred dollars and interest thereon, tendered me by the solicitors of said A. A. Wenham as above admitted, and that upon receipt thereof I execute to said complainant a good and sufficient deed, conveying to him the title to an undivided one-half interest in said mining property or "Burner" lode mining claim ought not to be granted, but that the bill of complaint of the said A. A. Wenham ought to be dismissed with costs, and further this defendant saith not.

WILLIAM S. SWITZER.

AARON H. NELSON,
Solicitor for Defendant.

State of Montana,
Lewis and Clarke County, } ss.
District of Montana.

William S. Switzer, being duly sworn, deposes and says: That he is the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to those matters he believes to be true.

WILLIAM S. SWITZER.

Subscribed and sworn to before me this 31st day of January, 1891.

[SEAL.]

WM. J. BRENNEN,

Notary Public in and for Lewis and Clarke County, Montana.

Endorsed:—No. 60. In United States Circuit Court for the District of Montana. In Equity. A. A. Wenham vs. William S. Switzer. Answer of Defendant. Filed Feb. 2, 1891. Geo. W. Sproule, Clerk. A. H. Nelson, solicitor for defendant.

And thereafter, to-wit, on the 30th day of June, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

A. A. Wenham vs. William S. Switzer.

On motion the names of Word and Smith added as solicitors for plaintiff. And thereafter, on said day, to-wit, June 30, 1891, plaintiff filed his replication herein, which said replication is in words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } In Equity.

This repliant, A. A. Wenham, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainty and insufficiency of the answer of the said defendant, for replication thereto, saith that he doth and will ever, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this repliant.

Without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein, are hereby well and sufficient replied unto, confessed or

avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct; and hereby pray as in and by his said bill, he hath already prayed.

ROBINSON AND STAPLTON,
Deer Lodge City, Montana.
SAMUEL WORD AND ROBT. B. SMITH,
Pittsburg Block, Helena, Montana.
Solicitors for Plaintiff.

Endorsed:—No. 60. In the Circuit Court for the District of Montana. A. A. Wenham, plaintiff vs. William S. Switzer, defendant, *replication*. Filed June 30th, 1891. Geo. W. Sproule, Clerk. J. C. Robinson and Word & Smith and G. W. Stapleton, Attorneys for plaintiff.

And thereafter, on said 30th day of June, 1891, defendant herein filed a motion to dismiss the bill of complaint of complainant, which said motion to dismiss is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit,
District of Montana.

A. A. Wenham, <i>Plaintiff</i> ,	} In Equity.
vs.	
W. S. Switzer, <i>Defendant</i> .	

MOTION TO DISMISS COMPLAINT.

To the Honorable, the Judges of the United States Circuit Court for the District of Montana:

William S. Switzer, defendant in the above entitled cause, by his Counsel, moves that the Bill of Complaint of the above named plaintiff be dismissed, and for the reason that this Court is without jurisdiction of the subject matter in controversy, in this that the Complainant prays a decree of specific performance of an alleged contract involving only the undivided one-half interest in a certain mining claim, which said one-half interest is expressly shown by said Bill of Complaint to be of the value of Two Thousand Dollars (\$2,000.00,) and no more.

Under the limitations of the Judiciary Act of 1875, 24 St., at L. p. 52, this Court is without jurisdiction in the premises.

Wherefore, defendant prays that this cause be dismissed with costs.

AARON H. NELSON,
Solicitor for Defendant.

Endorsed:—No. 60. U. S. Circuit Court, Ninth Judicial Circuit, District of Montana. A. A. Wenham vs. W. S. Switzer. *Motion to Dismiss Complaint*. Filed June 30th, 1891. Geo. W. Sproule, Clerk. A. H. Nelson, Solicitor for Defendant.

And thereafter, on the 13th day of July, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. William S. Switzer.

This cause came on this day for hearing upon the motion of defendant to dismiss said action for want of jurisdiction. After argument thereon said motion was submitted to the Court; thereupon said motion was denied; to which ruling defendant then and there excepted, and said exception was allowed.

And thereafter, on the 13th day of July, 1891, plaintiff filed an affidavit herein, which said affidavit is in the words and figures following, to-wit:

State of Montana, }
Silver Bow County, } ss.

John Stano, being first duly sworn, upon oath says as follows: I am well acquainted with what is known as and called the Burner Lode Claim, situate, lying and being in Summit Valley Mining District, Silver Bow County, State of Montana, and being in Park Canon, about four hundred feet southeast from Humphrey's old Arastra, and being the only Burner lode claim in said county. Said claim is described in the amended location thereof made in 1887 as being in the southeast $\frac{1}{4}$ of unsurveyed section No. 9, in township No. 3 north range 7 west. This being the same claim claimed by William Switzer, and in regard to which a suit is now pending in the United States Circuit Court at Helena, Montana, between A. A. Wenham and William Switzer. Said claim being 1500 feet in length as located, by 600 feet in width. I have known said lode claim for over four years last past, and I know the value thereof said claim for and during any time within said four years last past before the date of this affidavit has been and now is worth the sum of four thousand five hundred dollars in cash, and during all of said time one-half thereof has been and now is worth the sum of two thousand two hundred and fifty dollars in cash.

I am well acquainted with all the claims in the vicinity of said Burner lode claim and know the value thereof, and of mining property generally in said Silver Bow County.

JONH STANO.

Subscribed and sworn to before me this 10th day of July, A. D. 1891.

[SEAL.]

G. W. STAPLETON,
Notary Public.

Endorsed:—No. 60. In the District Court U. S., Ninth Circuit, District of Montana. A. A. Wenham vs. William Switzer. Affidavit. Filed July 13, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 15th day of July, 1891, plaintiff filed his affidavit herein, which said affidavit is in the words and figures following, to-wit:

The State of Ohio, }
Cuyahoga County, } ss.

AFFIDAVIT OF ARTHUR A. WENHAM.

Arthur A. Wenham being duly sworn according to law, deposes and says that, at the time of the filing of the Bill of Complaint by said A. A. Wenham, against W. S. Switzer, the property in controversy in said action was then, and now is, worth more than Five Thousand Dollars (\$5,000.00), and that the half interest of said Wenham in said property in said action involved was then, and now is, more than Three Thousand Dollars (\$3,000.)

ARTHUR WENHAM.

Sworn to before me and subscribed in my presence by the said Arthur A. Wenham, this 8th day of July, A. D. 1891.

[SEAL]

E. W. GODDARD,
Notary Public.

Endorsed:—No. 60. A. A. Wenham vs. Wm. Switzer. *Affidavit*. Filed July 15th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 5th day of November, 1891, defendant filed his motion to dismiss said cause, which said motion is in the words and figures following, to-wit:

In the United States Circuit Court for the District of Montana.

(No. 60.)

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } In Equity.

To the Honorable, the Judges of the United States Circuit Court of the District of Montana, Ninth Circuit:

MOTION TO DISMISS CAUSE.

Now comes the above named defendant and by his solicitor

moves that the deposition of plaintiff taken under commission issued herein, September 7th, 1891, be rejected and the cause dismissed under the operation of Rule 69 of Equity Practice in the United States Courts, viz: "Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof, shall upon special cause shown by either party, enlarge the time; and no testimony taken after such period, shall be allowed to be read in evidence at the hearing."

Replication in this cause was filed June 30th, 1891. Deposition of plaintiff was taken October 13th, 1891, and filed herein November 2nd, 1891.

AARON H. NELSON,
Solicitor for Defendant.

Service of within notice acknowledged this 5th day of November, 1891.

WORD & SMITH.

Endorsed: (Title of Court and Cause.) Filed November 5, 1891. Geo. W. Sproule, Clerk.

And thereupon, on said day, to-wit, November 5, 1891, said motion, by agreement of counsel, was duly submitted to the Court for consideration and decision.

And thereafter, to-wit, on the 23d day of November, 1891, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

A. A. Wenham vs. William S. Switzer.

This cause came on this day for the decision of the Court upon the motion of defendant to strike from the files the depositions taken by complainant, and after due consideration it is ordered that said motion be, and the same hereby is granted; and said depositions ordered stricken from the files.

And on said day, to-wit, November 23, 1891, the Court filed its opinion on said motion, which said opinion is in the words and figures following, to-wit:

In the United States Circuit Court, District of Montana.

A. A. Wenham, *Complainant*,
vs.
William S. Switzer, *Defendant*.

On Motion to Strike Depositions from Files.

ROBINSON & STAPLETON, and
WORD & SMITH,

Solicitors for Complainant.

AARON H. NELSON,

Solicitor for Defendant.

Opinion filed November 23, 1891.

GEO. W. SPROULE, Clerk.

The defendant moves to strike from the files the depositions taken on the part of complainant in the above cause, because not taken within three months after issue was joined therein.

There seems to be no dispute but that the deposition was not taken within three months after that date. The cause is one in equity. A portion of rule 69, in equity prescribed by the Supreme Court, reads:

“Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing.”

It seems under the decision of Fisher vs. Hayes, 12 Blatchford, 25, when proofs are not taken in proper time, they may be filed under certain conditions *Nunc pro tunc*. But no motion of that kind has been made in this case, and I do not know that the extenuating causes which would allow this exist. Under the above rule there seems no discretion in this court but to grant the motion of defendant.

It is therefore granted and said depositions are hereby stricken from the files.

And thereafter, to-wit, on the 29th of April, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

Ordered that said cause be tried before the court and cause ordered set for trial May 26th, 1892.

And thereafter, on the 26th day of May, 1892, the following further proceedings were had, and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

This cause heretofore set for trial this day came on regularly for trial before the court, and thereupon George W. Stapleton and A. A. Wenham sworn as witnesses on behalf of complainant, and documentary evidence introduced, and thereupon further trial of this cause continued until May 27th, 1892, at 10 a. m.

And thereafter, to-wit, on the 27th day of May, 1892, the fol-

lowing further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

Counsel for respective parties present as before, and trial of cause resumed. Thereupon A. A. Wenham, recalled as a witness and documentary evidence introduced, and thereupon Wm. S. Switzer sworn on behalf of defendant, and thereupon evidence being closed, argument of cause continued until June 7th, 1892.

And thereafter on the 7th day of June, 1892, the following further proceedings were had and entered of record herein:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

Counsel for respective parties present and argument of cause resumed, and thereupon cause submitted to the court for consideration and decision.

The evidence taken in said cause, and all exhibits filed therein being in the words and figures following, to-wit:

Mr. Stapleton called, sworn and examined on the part of the plaintiff, testified as follows:

Examination by Mr. Smith—

Q. Mr. Stapleton, you are one of the solicitors—attorneys for Mr. Wenham?

A. Yes, sir.

Q. You are acquainted with Mr. William S. Switzer?

A. Very Well.

Q. You may state whether at any time you made to Mr. Switzer a tender of any money for and on account of Mr. Wenham with reference to an interest in the Burner Lode Claim?

A. A short time before the commencement of this suit, and before the bringing of it, the date I do not remember, I went to Mr. Switzer at Butte City, to tender him \$500, with interest thereon computing from 1st of June, 1888, but not knowing the exact time it ought to be computed from I tendered him about \$60 more, knowing pretty well he would not receive it: so that there should be no question about it, and I tendered him \$50 over and above that, and \$150 over and above that amount.

Mr. Nelson—That is just the testimony I object to. It is not set out in the complaint. The bill distinctly states that the tender was \$500 and interest.

The Court—He says, tendered that to him with interest, but there seems to be some dispute as to when the interest would commence to run.

Witness—I calculated the interest from about the 1st of June: I think, from the 1st of June, 1888, and not knowing whether that would be sufficient I tendered \$60 more, so as to be sure to cover what the interest might be.

The Court—What is that \$150 for ?

A. It was for one-half the cost of patenting. It was over one-half I tendered so as to give more than it would be. Mr. Switzer claimed that he had been at some expense for proceedings to patent his ground, and I tendered him for Mr. Wenham \$150, Mr. Wenham's half of the first expense.

The Court—That would not be competent. Objection sustained.

Mr. Smith—The next point is that this tender was for the purchase price and interest.

Mr. Nelson—We admit that.

Mr. Smith—Now sir, at that time did you offer him a deed to sign ?

A. Yes sir. (Witness is handed paper.) I offered him first what is known as a bargain and sale deed. I have it in my hand.

Bargain and sale deed offered in evidence as Plaintiff's Ex. 1.

(Witness continues.) I asked him to sign it and he refused, and so there might be no question I offered him for the same property a quit claim deed and asked him to sign it, which he refused to do. Do not remember at that time that I had any conversation with Mr. Switzer about balance of purchase money—I do not remember that I did. I do not remember that we had much conversation at that time: it has been some time ago.

Quit claim deed offered in evidence and marked Plaintiff's Ex. 2.

Witness excused.

Court adjourned until 2 o'clock p. m.

2 p. m. May 26.

Mr. Wenham called, sworn and examined on the part of the plaintiff, testified as follows:

Attorney for defendant objects to introduction of this testimony. It is admitted that these parties have never seen each other; the entire contract, if there was any, grew out of correspondence and has been conducted by correspondence. It is a case of documentary evidence entirely.

Mr. Smith—There are some questions I desire to ask the witness.

Objection overruled.

Q. You are the plaintiff in the case, are you, Mr. Wenham?

A. Yes sir. Am not personally acquainted with Mr. Switzer. As to the relations existing between Mr. Switzer and myself prior to correspondence relating to Burner Lode Claim, about which this suit is brought, in the latter part of 1886 we had correspondence relating to the Monitor tunnel. Correspondence very friendly; so much so that I used to send papers; also sent the Mining Journal. Both interested as co-owners in said claim, Monitor Tunnel.

Q. I will ask you to state, Mr. Wenham, whether or not this is a letter received by you from Mr. Switzer; is that letter received by you from Mr. Switzer? (Hands witness letter.)

A. Yes sir.

Q. This is a letter dated October 2, Butte City, Montana, 1887, addressed to Mr. A. A. Wenham. The first part of it is in relation to their Monitor Tunnel business. I will not read it unless the Court desires it—"Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta Lode, which I think can be got for \$1500, I wish you would let me know. Some time ago I bought one-half of it. It cost him about \$2000. He is not a miner. The ground is a softer formation than where I am running our tunnel and can be worked very easy. It is sloping toward the creek, and adjoining, so the ores can be all run from it, and all concentrated through our concentrator. It slopes north to our south line of the Alta, while our grounds slope south; so sloping together it is cheap, I think. Two large veins run lengthwise through it east and west. Same course of ours; and please let me know. From now until spring is the time to pick up property cheap. If you think a sale can be effected I will send you a copy or plat of it, as it lays adjoining our grounds, the Alta Lode Claim. Then any one can come out, or I will get a deed of it in the bank and the exchange can be made either way. And I will get it cheap

as any price can be had for it. Yours in confidence, William S. Switzer." That is all with reference to that part of the letter referring to this matter. Now, Mr. Wenham, I will ask you whether or not you made any reply to that ?

A. As far as I remember I asked him for a further description of it, and what it could be got for.

Mr. Nelson—I was duly served with notice to produce letters, and I suppose Mr. Switzer, who has not yet arrived, would produce those I have not. I have no letter that the plaintiff alleges is in answer to this.

Witness excused.

Court adjourned until 10 a. m., Friday, May 27.

Owing to the absence of witnesses case adjourned until 2 p. m. Friday, May 27th, 1892.

2 p. m.

Mr. Nelson.—As this case clearly rests upon documentary evidence entirely, the plaintiff and defendant having met to-day for the first time, it certainly would not be competent to produce any parole evidence, except to sustain the documentary evidence, and I would ask the Honorable Court to rule in this way in regard to this matter; that the letters which have passed between these parties upon which the contract rests be first produced, and to this effect both plaintiff and defendant can be sworn that these are all the letters that either of them have received pertaining to this matter; that these letters be presented to the Court, and if the Court finds any hiatus, and desires other evidence which is competent, to introduce parole evidence.

The Court. As this case stands, the contract would have to be proved in writing, but independently of this evidence and so on, can be proved by parole before the letters are produced.

Mr. Nelson. After parties are on the stand and sworn that these are all the letters that passes between them, then as we read these letters that the court select only such parts which are competent and as to any difficulty in establishing the case either on part of the plaintiff or defendant that the Court rule.

The Court. You admit that all letters these parties introduce here were letters that were written by the defendant ?

Mr. Nelson. We admit that.

The Court. Proceed and read your letters.

Mr. Wenham recalled and testified as follows :

I read on yesterday letter dated Oct. 2nd, 1887, from Mr. Switzer to yourself; about what time did you receive that letter dated Oct. 2nd, Butte, Montana ?

A. I should think about four days. Answered that letter in October; did not keep any letter press copy of letter; know from recollection; answered that letter prior to 15th day of March, 1888. As far as I remember my answer was to the effect that I inquired further about this property, and also about the Monitor Tunnel, but I do not think I made any direct acceptance at that time.

Q. Here is a letter written again by Mr. Wenham on the 15th of March, 1888, and I will read that part referring to this question. "I want to go in with you. Could the interest be bought for \$1,000.00? Friend Whitney will be out to see you soon, I think. We could work the claim after the Monitor was well under way. I suppose you would be in no hurry to develop that claim until after the tunnel was complete. I hope you will be successful in getting the Sunlight. That is all I believe in that letter that refers to that claim. This seems to be an answer from one from Mr. Switzer dated the 7th day of March. Mr. Switzer wrote the 7th day of March. It reads: "In relation to the claim I wrote you the Colorado party owner was out. I think he will sell or will incorporate this year." That is all, and this letter I just read was the answer to it, in which Mr. Wenham asks: This letter No. 8 is marked Ex. 4, also letter A marked Exhibit 5. I will read (reads from Ex. 6) "Before the weather gets too hot—Hope you will be able to secure the Sunlight west before it gets too hot—that is not in relation to this property—before it gets too late if you should get the claim adjoining the Alta all right. There is no hurry, as we could not work it for some time to come." This claim adjoining the Alta is the one. We file this as Ex. 6. Next letter appears to be in answer to letter of Mr. Wenham of the 26th—of this one just read. "Butte City, April 13th, 1888. Yours of the 26th (which is the one just read.) In relation to the interest nearest the Alta it can't be had for less than about \$1,500.00, if it can be bought at any price, but I shall know in about 20 days, and I will write you soon as I can get to let you know what I can let you have it for. He may get excited and ask more. Mining property is changing hands here now, and a little anxiety shown now, but nothing surprising yet. One thing more, if you conclude to take the interest you better send \$1,500.00 to the First National Bank of Butte. As if you wait it may slip in others hands. I am good for all you send to me." That letter is signed by Mr. Switzer, and is marked letter No. 2 now Ex. 7. Here is one that appears to be written before that. "How about the

claim adjoining the Alta claim. Can you secure the one-half you spoke of. Let me hear from you as soon as possible." This is from Ex. 8. Letter dated April 23d, in answer to this one. "Yours of the 13th at hand and contents noted. According to your wishes I enclose you \$500.00, payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city. In fact the banks prefer drafts to currency. Now if you go quietly to work and not let the parties who want to sell get excited, when he agrees to sell give him \$500 to bind the bargain, and you can telegraph me for the other \$1,000.00, which I will send immediately on receipt of notice, and if you can't buy all of his interest buy half of it." In regard to the claim next the Alta please keep it confidential until something is done; and, by the way, what is the name of the claim?" That is dated the 23rd of April, 1888. That is the one in which the first money was sent by Mr. Wenham (Ex. 9.) In answer to that, on April 28th Mr. Switzer wrote this letter: "Yours of the 23rd, 1888, is received, with one check of \$500.00 on the First National Bank of Cleveland, Ohio. The mining lode claim is known as the Ontario, or Burner Lode Mining Claim. Soon as I can hear from the party the matter will be concluded. The money is in bank." (This letter marked Ex. 10.) Here is one written May 26th, from Mr. Wenham: "My Dear Sir—Yours of April 28th at hand acknowledging receipt of check for \$500." That is all it is. That was May 26th. On June 5th Mr. Switzer writes this letter: "In relation to the Burner mining property I have got it all and paid for it, and surveyed it for a patent, but am doing \$100.00 worth of work, so as to have over \$600 worth of work, which will be a necessary improvement. I am sure of two veins on the ground; but it cost more than \$1,500. It all cost me about \$4,000, all told, but I was determined to have it if it cost more. It will pay to hold when patented. Property is rising in Park Canyon. Under the circumstances I had to take a deed in my own name, and of course had to pay for it on the delivery of the deed, and came near losing it at that. Others would take it at higher figures. Now friend A. A. Wenham send me \$1,500 and I will make you a deed of one undivided one-half of the entire Burner property, free of all work, excepting the one hundred which I am now doing, which work will be over \$600, sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which is only the regular price in this district and territories. As I have received \$500 of you, so the balance, \$1,500, will make the purchase money of your part \$2,000. I will write you more in detail next letter." That is all he says about that. Did you write anything further to the defendant after this letter I have just read?

A. I think shortly after that time I wrote him in detail asking for plat and a description of the property he spoke of in letter No. 1, and other points of interest which required to be known in buying

the property. Did not get any more letters after June 5th from Mr. Switzer. He said he would write in detail—until about six or seven months after.

Q. And this letter, No. 5, May 30th (Ex. 14), 1889, is the next letter you received?

A. Yes sir.

Q. I will now read No. 5 (Ex. 14), May 30th, 1889. This seems to have been an answer to one No. 6, No. 6, 1889. No—April 6th, 1889 (Ex. 13). It says: "Not having heard from you since some time last April or May I have felt as though you had rather neglected my last letter, written to you some time in the early part of June last. However, as you are the senior I accept the situation. I enclose check on New York for one thousand dollars. Please let me know how much you figured to be the balance. You now have \$1500 in total from me. I have thought it quite strange that I had not heard from you. However, I supposed you would write when you were ready. But as it was a matter of business I thought it my duty to write to you now as time was drawing close. I hope you are enjoying good health," etc. That seems to be all in reference to this. This is the letter of April 6th, 1889, enclosing \$1000 and asking why he had not heard from him, etc. We will file that marked Ex. 13: On May 30th, answering "Your note of April 6th, 1889, containing one check for one thousand which I deposited in the First National Bank for safe keeping until you call for it. Also your five hundred check is in the bank subject to your order. Now the best investment I can make with the money for you is in the Monitor property, which I think will be safe. By your request and Mr. C. W. Pomeroy's request I will make you a deed for 1500 shares of the Monitor, shares at one dollar per share. I can't make you any deed to or in the Burner ground." That is all, I believe, in relation to that. This letter is marked Ex. 14.

Q. I will ask you this further, this check for \$1000 which you sent, was that at any time returned to you?

A. It was.

Q. What time, Mr. Wenham?

A. It will tell you, I think, in a letter there. It was returned to me with the check for \$500 by Mr. Nelson on May 25th, 1891, I think, after I brought the suit. I returned them.

Q. State whether or not since that time the checks have been returned to you as paid.

A. They have.

Q. By whom is it endorsed ?

A. William S. Switzer.

Cross-Examination by Judge Nelson—

Q. Mr. Wenham, you testified that in answer to this first letter of Mr. Switzer, dated Oct. 2d, 1887, you wrote asking making some inquiries as to the character of the claim adjoining the Alta. Did you at that time understand the claim to be the claim now in controversy, the Burner Lode Mining Claim?

A. Yes Sir. Understood it so because he said it was adjoining the Alta; there are other claims adjoining the Alta,—in close proximity—not east and west Sunlight. There were other claims adjoining, I think the Sunlight does not adjoin the Alta.

Q. How then did you connect this indefinite proposition to dispose of half interest to some friend as in the letter of Oct. 2nd, with this Burner lode claim?

A. In letter No. 1 you will see the property described by Mr. Switzer. Prior to letter No. 1 think I had some knowledge of claim from Mr. Pomeroy. Letter No. 1 describes it also. I will tell you how I know, that I replied to this letter of Oct. 2nd, some time in the same month in which it was written; as a rule I never allow a letter to go unanswered, especially a letter of that nature, and I am very sure that I answered the letter: did not keep copy of letter.

Q. You kept no copies of any of the letters in connection with this transaction?

A. No. The transaction is an isolated one from my business, but I remember it very distinctly. Though it is five years or more from the time when this letter was written I am almost positive because this case was commenced some two years ago, was started; at that time my memory was refreshed; previous to the institution of this suit. My memory was refreshed and I would remember very nearly what I had answered. I am almost positive that I answered that letter.

Q. And that the contents of your answer was so far as this claim was concerned, in the nature of a general inquiry as to what this claim adjoining the Alta was?

A. That is my general recollection. Was at that time and since engaged with Mr. Switzer the defendant in this case in connection with the Monitor Tunnel property. These letters which have been produced in Court did at times contain inquiries regarding east and west Sunlight claims. Mr. Pomeroy thought the syndicate

ought to buy these properties, and there was a party thought of taking hold of them, but they were held at such high prices they could not be got.

Q. Why are you so positive that in 1888, in October, 1887, you replied to this first letter of the defendant making a possible proposition that he might buy a half interest for some friend, that you replied to that especially inquiring in regard to this claim, when you were constantly sending letters making inquiries in regard to other claims?

A. I had a great deal of confidence in Mr. Switzer, and he represented that this half interest was very cheap.

Q. This letter Ex. A (Ex. 5) is your letter to him, dated March 15th, 1888, in which you make an inquiry like this: Here are your words. "Now about the claim adjoining the Alta. I want to go in with you. Could the interest be bought for \$1,000.00?"

A. That is right.

Q. Now you said under oath that in October, 1888, you made a similar inquiry?

A. I made inquiries about the property I am pretty sure.

Q. You cannot swear then that prior to the date of March 15th, 1888, you made no positive inquiry in regard to this property in answer to Mr. Switzer's letter of October 2nd?

A. I am almost positive I inquired about the character of the property.

Q. At the same time you were writing general letters in regard to these properties.

A. I answered his letters substantially point for point. Did not keep copies.

Q. So far as these letters that have been produced are you aware of any other letter of yours that has not been produced by the defendant except this alleged answer to letter of October 26th?

A. I cannot say as to that. Do not know positively as to whether all letters that ought to be here relating to this—my letters.

Q. Except one that you say was an answer to his of October 2d.

A. I would not say; we were writing possibly right along, in regard to this matter. In direct examination I testified that in answer to a letter from the defendant dated June 5, 1888, making a specified offer to me of this property—of the half interest in it—for

a specified sum—that I replied to that letter very soon after, about that time. Do not think you have produced that letter. Am so sure that I answered this letter of defendant's dated June 5th because it required an answer. I forget the substance of the letter you speak of.

Q. I am speaking of your alleged answer to the defendant's letter of June 5th, 1888, in which he did make a specified offer of a deed to one-half interest in this property to you for the sum—

A. I remember. I think about that time I wrote Mr. Switzer asking him for full description and plat, as he had promised to give me, stating particulars of the case, and such information as he had agreed to give in letter No. 1; I think you will find it there. Wrote him in answer to his letter of—marked No. 1—asking for further details.

Q. In his letter of June 5th, produced here, he makes a specified offer.

A. About that time, I think, I wrote him asking for full description.

Q. I will read.

Q. I will read a letter here, June 4th (Ex. 15.) This letter is a letter that crossed in the mail, evidently the defendant's letter of June 5th. "Mr. C. C. Frost is in trouble, and wants \$500 to carry on his suit. He is willing to give deed of his interest in Sun Light as security for the \$500 for three or four months, the deed to be put on record. Now friend Switzer, if you think Mr. Frost can give a good deed as security and you think best and safe to loan him the money you can give him the \$500 I have in your care, and I will send you more to take its place. I would get his note also his deed. Is it necessary for his wife to sign the deed in Montana? Have same put on record. Would it not be best for you to have your lawyer fix up the loan? The money I have with you might as well be drawing interest. What is legal rate of interest in Montana? If anything should happen that Mr. Frost could not meet his obligations his claims would not fall into stranger's hands." Your letter of June 4th apparently crosses Mr. Switzer's letter of June 5th. What was the outcome of that proposition to loan \$500.00?

A. Mr. Frost got into trouble,—it was not loaned I believe. Do not know how long after this letter of June 4th was written that it was decided not to loan this \$500 to Mr. Frost; I know that Mr. Frost did not get the money from Mr. Switzer. I loaned Mr. Frost myself \$500.00; sent it to him.

Q. Did you ever write to Mr. Switzer after this letter of June

4th, 1888, in regard to your proposition, anything more in regard to this \$500.00.

A. I think not. I understood from outside parties that Mr. Switzer refused to loan the money, too—I heard it.

Q. You directed him to loan to Mr. Frost, and yet you had no further correspondence as to this \$500.00?

A. That \$500 was sent to Mr. Switzer to secure this claim. Would have replaced it.

Q. But the question I now ask you is, did you not correspond with Mr. Switzer in regard to this contemplated loan, \$500, to Mr. Frost?

A. I may have written him, but I loaned the money myself; gave N. Y. draft to Mr. Frost, having heard Mr. Switzer would not loan it. Did not write to Mr. Switzer about this loan, that I know of; had no reason to; Mr. Switzer did not care to loan Mr. Frost the money. Ascertained that through a third party.

Q. And then from that time until the next April or May, ten months or more, you said nothing more to him about this \$500 you told him to loan?

A. I wrote him, I think, asking if he had secured the claim. Do not remember when it was. In answer to this letter of June 5th, wrote to Mr. Switzer asking for further information in regard to the claim—asking for plats, etc.

Q. Then that letter must have been written after his letter of June 5th.

A. I think it was written after.

Q. I have here a letter of yours, April 6th, 1889; this is about nine months after Mr. Switzer's letter of June 5th making you definite proposition for half interest. "Not having heard from you since some time last April or May, I had felt as though you had rather neglected me." How do you account for that statement when you had Mr. Switzer's letter of June 5th?

A. I cannot tell you, I may not have recollected the date. As to receiving letter from him dated June 5th, 1888, and this letter saying had not heard anything from him since April or May; also that in answer to his letter of June 5th, I wrote asking for further details, will tell you how I can account for that. I probably did not get the letters out and look them over; that is the only way I can account for that. Know I sent letter in June, 1888, in answer to Mr. Switzer's letter of June 5th, because it was getting pretty late. He had been negotiating with these gentlemen and wanted to buy

this interest, and I had not heard from him for some time. Know on this date, 27th of May, 1892, that I answered Mr. Switzer's letter of June 5th, 1888—as near as I can recollect it was about that time; I am pretty positive that I asked him, as I said before, for description and plat of the property. I think you will find that letter on file somewhere.

Q. This letter of yours agrees with the record, because you say you have not heard from him since April or May. Does not that agree with the record? “I have felt as though you had rather neglected my last letter written to you sometime in the early part of June last. However, as you are the senior, I accept the situation. * * * * Let me know how much you figured to be the balance.” This letter is dated some nine months after you received the letter from him in which he positively stated what the balance was. Why did you ask him?

A. I asked him for survey and plat, as he agreed to give me in his letter No. 1. Asked him how much he figured the balance was, because I thought there was some patenting and some assessment work and some other details. Almost positive that I wrote letter in answer to letter of June 5th. I kept no copies of my letters; I should have done so.

Q. If you wrote such a letter, are you certain that you posted it?

A. Positive. Posted it right at the side of the desk where they are put usually. Use stamped envelopes. Addressed it Wm. S. Switzer, Butte, Montana. To the best of my recollection these are the facts.

Q. Now in this letter in which you say that you have not heard from him since April or May, and enclose him \$1,000, and ask what further amount is due, why did you send \$1,000, when in the letter of June 5th, 1888, he told you you must send \$1,500.00?

A. I, sent \$1,000.00 expecting to get a reply telling me how much the balance was. He had told me the purchase price was \$1,500—the balance of the purchase price, but there was some patenting I understood and some assessment work and some other items had to be paid for.

Q. You do not get my question; why when Mr. Switzer made you a proposition to deed you an undivided one half interest in this Burner lode claim if you would send him \$1,500, he stating that he had in his hands at that time \$500 belonging to you, why did you, nine months after, send him only \$1000, if the \$1,500 was due, and then there was some patenting and expenses besides that in addition to the \$1,500?

A. That is very true.

Q. Why send him only \$1,000 when he called for \$1,500?

A. I sent \$1,000 as I would to any one else, and wanted full amount of the balance which I would send a check for—a draft. He says I think that \$1,500 would be the balance but there would be some other expenses; if you will read that letter further.

Q. I will read from the copy. “Now friend A. A. Wenham send me \$1,500 and I will make you a deed of one undivided one-half of the entire Burner property and free of all work excepting the one hundred which I am now doing, which work will be over \$600 sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which is only the regular price in this district and territory.”

A. Yes I did not know what the price was.

Q. This letter of June 5th, 1888, you replied to under date of April 6th, 1889, and yet did not know how much you were to send him?

A. Yes Sir.

Q. Did you not know, Mr. Wenham, that you were to send him \$1500 as the price of the property besides?

A. Yes: that is very plain.

That is all.

Re-direct examination by Mr. Smith—

Q. Mr. Wenham, when you wrote this letter of June 4th, 1888, asking Mr. Switzer to let Mr. Frost have that \$500 at that time, did you know Mr. Switzer had used the \$500 in the purchase of this property he was negotiating for?

A. The property had not been purchased at that time.

Q. You did not know until you received this letter of June 5th.

A. I do not think I did.

Q. In your letter you say you will immediately replace the \$500 in his hands?

A. Yes sir.

Q. And afterwards you learn that he did not let Mr. Frost have the \$500, and let him have it yourself?

A. Yes, the June 5th letter winds up and says, “I will write soon more in detail,” but I never got any answer to it.

Q. You are a citizen of the State of Ohio, City of Cleveland ?

A. Yes sir.

That is all.

Plaintiff rests.

Mr. Switzer, called and sworn on the part of the defense, testified as follows:

Direct examination by Judge Nelson—

Q. Mr. Switzer, you are defendant in this case?

A. Yes sir.

Q. You heard Mr. Wenham testify as to having sent you a reply to a letter of yours, dated Oct. 2d, 1887, in which you said that there was a claim adjoining the Alta that you thought you could get a one-half interest in it for some friend of his: did you ever receive such a letter.

A. Never received any such letter. I could not find any such letter, and do not believe I ever had any such a letter.

Q. According to the best of your recollection then this letter of March 13th, 1888, from Mr. Wenham, is the first letter that you received from him in regard to this property, after that letter of yours of October 2nd, 1887, is it?

A. Yes, sir.

Q. By your letter of April 28th, 1888, to Mr. Wenham, you acknowledge the receipt of \$500 by check on the First National Bank of Cleveland, Ohio. In the letter in which Mr. Wenham transmits that he says: "According to your wishes I enclose you \$500 payable to your order. This is a N. Y. draft, and is as good as gold at the First National Bank in your city." As there is nothing in your letter as to what that \$500 was on account of, what did you do with that \$500?

A. I took the check—the draft I think it was—and put it on deposit in the First National Bank and notified him in one of my letters. In my reply to that letter told him he could get an interest possibly at that time; did not know how much it could be bought for, but if he did not want to be left he must send me \$500; this \$500 was not in answer to my call for \$1,500.

Q. And for that reason you put it in the bank, did you?

A. I put the checks in the bank.

Q. Now Mr. Switzer in the pleadings you swear that after the

A. That is very true.

Q. Why send him only \$1,000 when he called for \$1,500?

A. I sent \$1,000 as I would to any one else, and wanted full amount of the balance which I would send a check for—a draft. He says I think that \$1,500 would be the balance but there would be some other expenses; if you will read that letter further.

Q. I will read from the copy. “Now friend A. A. Wenham send me \$1,500 and I will make you a deed of one undivided one-half of the entire Burner property and free of all work excepting the one hundred which I am now doing, which work will be over \$600 sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which is only the regular price in this district and territory.”

A. Yes I did not know what the price was.

Q. This letter of June 5th, 1888, you replied to under date of April 6th, 1889, and yet did not know how much you were to send him?

A. Yes Sir.

Q. Did you not know, Mr. Wenham, that you were to send him \$1500 as the price of the property besides?

A. Yes: that is very plain.

That is all.

Re-direct examination by Mr. Smith—

Q. Mr. Wenham, when you wrote this letter of June 4th, 1888, asking Mr. Switzer to let Mr. Frost have that \$500 at that time, did you know Mr. Switzer had used the \$500 in the purchase of this property he was negotiating for?

A. The property had not been purchased at that time.

Q. You did not know until you received this letter of June 5th.

A. I do not think I did.

Q. In your letter you say you will immediately replace the \$500 in his hands?

A. Yes sir.

Q. And afterwards you learn that he did not let Mr. Frost have the \$500, and let him have it yourself?

A. Yes, the June 5th letter winds up and says, “I will write soon more in detail,” but I never got any answer to it.

Q. You are a citizen of the State of Ohio, City of Cleveland ?

A. Yes sir.

That is all.

Plaintiff rests.

Mr. Switzer, called and sworn on the part of the defense, testified as follows:

Direct examination by Judge Nelson—

Q. Mr. Switzer, you are defendant in this case?

A. Yes sir.

Q. You heard Mr. Wenham testify as to having sent you a reply to a letter of yours, dated Oct. 2d, 1887, in which you said that there was a claim adjoining the Alta that you thought you could get a one-half interest in it for some friend of his; did you ever receive such a letter.

A. Never received any such letter. I could not find any such letter, and do not believe I ever had any such a letter.

Q. According to the best of your recollection then this letter of March 13th, 1888, from Mr. Wenham, is the first letter that you received from him in regard to this property, after that letter of yours of October 2nd, 1887, is it?

A. Yes, sir.

Q. By your letter of April 28th, 1888, to Mr. Wenham, you acknowledge the receipt of \$500 by check on the First National Bank of Cleveland, Ohio. In the letter in which Mr. Wenham transmits that he says: "According to your wishes I enclose you \$500 payable to your order. This is a N. Y. draft, and is as good as gold at the First National Bank in your city." As there is nothing in your letter as to what that \$500 was on account of, what did you do with that \$500?

A. I took the check—the draft I think it was—and put it on deposit in the First National Bank and notified him in one of my letters. In my reply to that letter told him he could get an interest possibly at that time; did not know how much it could be bought for, but if he did not want to be left he must send me \$500; this \$500 was not in answer to my call for \$1,500.

Q. And for that reason you put it in the bank, did you?

A. I put the checks in the bank.

Q. Now Mr. Switzer in the pleadings you swear that after the

5th day of June, 1888, at which time you wrote Mr. Wenham a letter offering to deed him an undivided one-half interest in this claim if he would send you \$500, and also said that you would write more in detail. You have sworn that you did write him a letter after that time, and told him he must send you that money within a specified time or the agreement would not stand?

Objected to. Objection sustained.

Q. I will ask, did you after June 5th, 1888, write any other letter to Mr. Wenham in regard to this Burner Lode Claim?

A. I do not remember that I did. After June 5th, the letter in which I say I would write him more in detail, I wrote a letter in detail somewhat. It was several days after letter of June 5th, 1888, to the best of my recollection, that I wrote letter that I agreed to write him. I do not remember; I was very busy and thought I would take several days to think over the matter; then I wrote him. It might have been four or five days or a week; I do not remember the number of days; wrote him within a month.

Q. State now about what was the substance of that letter written after your letter of June 5th, 1888?

A. I stated to him that I had furnished my own money, what money I had in my hands of his—I did not feel I had a right to pay it out and the property was offered to me—I wrote after June 5th, and in detail as I had promised him.

Q. Now what did you say in your letter, the letter of June 5th?

A. I told him I would make him a deed if he would send me \$1,500.00 he had \$500 in my hands, which would make it \$2,000 that is the substance of the matter. After the June 5th letter I wrote that letter in detail I had promised. In substance I said in that letter that I would make a deed.

Q. Did you tell him that the money must be paid?

Objected to.

The Court. If he can remember what was in that letter he may reply to that.

Q. After June 5th, 1888, in which letter you say you will sell him this claim, "I will write you more in detail" did you write him more in detail?

A. Yes Sir. The substance of that letter more in detail, was in relation to the price I put on the—that was the substance of the matter. Heard Mr. Wenham testify to the fact that he wrote me

again after this letter of June 4th, in which he directed me to loan \$500 to Mr. Frost; testified that he wrote me again asking for further details in regard to the price of the Burner lode claim, but I do not remember that I ever received any such letter. He wrote me some letters in relation to the west Sunlight—I do not remember that there was anything in relation to the Burner claim I do not think, as I remember that he knew the name of the Burner lode claim then. The \$500 was never loaned to Mr. Frost.

Q. It was not loaned to Mr. Frost by you? Did you write again to Mr. Wenham in regard to loaning this money to Mr. Frost?

A. I told Mr. Frost—I believe I wrote to Mr. Wenham in relation to it. In regard to what I wrote to Mr. Wenham I told him Mr. Frost had requested me to loan him \$500 which I had of his money, and I said I would write to Mr. Wenham about it, and before I got an answer, I think it was a month or two or thereabouts, I heard from another source that Mr. Wenham had loaned Mr. Frost some money. I never received any letter from that time on until I received the draft. When I received the \$1,000 draft which Mr. Wenham sent me I wrote him I could not get the interest in the Burner lode claim for him because when I had the opportunity to buy the property I did not consider the money was mine which I had in my hands; I furnished my own money. I had to get it on short notice or other parties would have taken it, and I made up my mind to take it in my own name: pay for it myself and settle with Mr. Wenham on the proposition if he saw fit to take it after that; if not I would keep it myself. Mr. Wenham sent me \$1,000.00.

Q. Why, after having made Mr. Wenham an offer of an undivided half interest in this Burner lode claim in June 1888, when he sent you \$1,000 in 1889—why did you refuse to receive it on account of this purchase?

A. It had been so long a time that I made up my mind that he had forfeited all right and I did not consider I was under any obligations—according to the proposition I sent him.

Q. What proposition was it you sent him?

A. If he would send me \$1500, with what I had, I would make him a deed to one-half of the Burner Lode Claim, and considered he was good for the preliminary matters, such as patenting, expenses, etc. Nine months after, when he sent me this money, I did not receive it, because I thought he had been waiting so long to see if the property would raise in value, and I took it as an insult. He waited so long keeping me out of my money, not answering my letters, and I felt as though he was waiting to see if the property was growing in value.

Q. Why did he not have a right to wait?

Objected to and overruled. Ex.

Q. Why did he not have a right to wait nine months?

A. The proposition was for thirty days, I think. I think I made that proposition for thirty days after the letter of June—I forget the date of it.

Q. After that letter of June 5th you made a proposition that he must——

Objected to, because witness has not told any such thing.

Q. Did you at any time make a proposition to Mr. Wenham that payment must be made within any specified time?

A. Yes sir. To the best of my recollection that proposition was made by letter. It was made after my letter of June 5th, 1888, in which I told him the round figures. I remember that I wrote him making a proposition that this money must be paid within thirty days, because I think I had a copy of the letter.

Objection to the introduction of any oral statement, and move it be stricken out. It is incompetent.

Q. He thinks he had a copy, have you such a copy now?

A. I could not find it among my papers; have looked for it thoroughly. I think after my letter of June 5th, 1888, I wrote another letter, as I have just testified to, telling Mr. Wenham that he must pay this money within thirty days. I swear to that fact, because I thought he was a monied man, as I understood, and I thought there ought to be some stated time when the matter could be settled. Thought it would be business-like to have a time specified to pay out the money, and if he was ever going to take it he ought to take it——

Q. Let me ask you right here if you ever used any money sent you by Mr. Wenham in the purchase of this property?

A. Not to my knowledge.

Q. Now will you please answer me this question: If you wrote such a letter as you say you think you did, and it was after the letter of June 5th, 1888, are you certain, or to the best of your recollection did you properly direct and post that letter in Butte?

A. I did, and put it in the office with my own hands; in the Interior Department post office. I generally do. I do not know when I have asked a man to deliver a letter in the post office for me; I never have done so. Did not write any letter to Mr. Wenham about this case after that letter in which I told him the money must be paid within thirty days, until I got the \$1000 the next

spring; I have no knowledge of it, for I thought that he had not used me well, and I felt a little indignant, and that was the reason I did not write any more to him after that.

Q. Then when you received the \$1000 in 1889, you did not accept it for what reason?

Objected to.

The Court—The letter states, I believe. It tells his reason.

Q. Now, Mr. Switzer, from the beginning of this transaction between Mr. Wenham and yourself, did he ever make any proposition to you by letter or otherwise in regard to other matters, other claims that you and he were interested in?

Objected to as immaterial; objection sustained. Ex.

Cross-examination by Mr. Smith—

Q. Mr. Switzer, you were not the owner of half interest in this claim you were trying to buy when you wrote Mr. Wenham about it, was you?

A. I bought part of it at one time and the other I bought later.

Q. That was the part you would have liked to buy for him for some friend?

A. I might have.

Q. You owned one-half of it.

A. I bought one-half of it at a time, because one man lived in Butte and the other in Colorado.

Q. Now then, it was that man's interest that lived in Colorado that you wanted to buy for Mr. Wenham or some friend of his wasn't it?

A. No, sir.

Q. Let me ask this question; let me read this: "Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta, which I think can be got for \$1500 I wish you would let me know." What do you mean by saying which you think could be got for \$1500; somebody own half of that?

A. I owned half of the Burner Lode, I think, at that time.

Q. You say, "Sometime ago I bought one-half of it; it cost him \$2000. He is not a miner." He had bought one-half at that time?

A. Yes, sir. This other half—the man lived in Colorado.

Q. Now then, you corresponded with that man, didn't you, after getting word from Mr. Wenham?

A. I talked——

Q. About the purchase of it. Now when you bought this property didn't you use this \$500 that Mr. Wenham had sent you before that?

A. I didn't use a cent of his money; I had the drafts.

Q. Now I will ask you, Mr. Switzer, didn't you send \$1,500 to give to Mr. Wenham after the suit was brought?

A. Drafts.

Q. Was not one of \$500 signed by Andrew J. Davis, Jr., cashier of the First National Bank of Silver Bow county?

A. He never signed, to my knowledge.

Q. Didn't you go to that bank for \$500, which draft was signed by Davis, and put it together with the \$1,000 and send to your attorney?

A. I do not know.

Q. That money was put in the bank and kept there?

A. No, sir.

Q. Where?

A. I deposited it in the bank.

Q. Didn't you get the money out of the bank to pay for this claim.

A. I think I can explain. I wanted to get a draft to go to New York—direct to New York—and I told Mr. Davis to make me a draft to New York.

Q. You say, in your letter of April 28th, "Yours of the 23rd, 1888, is received, with one check of \$500 on the First National Bank of Cleveland, Ohio, * * * as soon as I can hear from the party * * * * the money is in the bank. You put this money in bank?"

A. Deposited it in bank—the \$500—in my favor, I think.

Q. And when you bought the claim you paid the money out of the bank, didn't you?

A. I paid—yes, I think, out of the bank. Had several thousand dollars on deposit.

Q. On June 5th did you ever write Mr. Wenham more than one letter in which you told him how much he had to pay you for this claim?

A. I do not know as I ever did; I do not remember now.

Q. Then this is the only letter, now Mr. Switzer, in which you made a proposition to Mr. Wenham as to selling him the one-half interest, and the amount he would have to pay for it. "I am sure of two veins * * * but it costs over \$1,500 * * * cost me about \$4,000 all told * * * Property is rising in Park Canyon. Under the circumstances I had to take a deed on my own account and came near losing it at that. Others would have taken it at higher figures." You were buying from somebody at that time?

A. I bought half interest from this Colorado man. I was buying a one-half interest at that time.

Q. "Now friend A. A. Wenham send me \$1,500 and I will make a deed of the one-half of the entire Burner property." Did you ever make him any other proposition besides that—in the same letter you say—

A. No, not stating any price.

Q. "As I have received \$500 of you so the balance will make the purchase price \$2,000," that was \$500 that he had sent you Mr. Switzer?

A. Yes, I—Mr. Wenham I think requested me to put the money in the bank and I did so.

Q. Now Mr. Switzer when you were making these payments through March, April, May and June, 1888, you were purchasing this property for Mr. Wenham?

A. I would never purchase it for Mr. Wenham until he furnished me the money to do so. I told him I thought he could get the property for \$1,500.

Q. "Now friend A. A. Wenham send me \$1,500 and I will make a deed of half the entire Burner property." Why do that if you were not purchasing for him?

A. I thought I would satisfy him and make him a proposition.

Q. Why say here "under the circumstances I had to take a deed in my own name."

A. Because I had no money of his that I could use.

Q. You wanted to secure this and take a deed in your own name?

A. I did not have enough of his money. I never agreed to furnish money for him to buy real estate.

Q. Was it not in order to secure this that you took a deed in your own name, when you furnished this money for him?—

A. It would secure me, but my purpose was to buy the ground, whether he took an interest or not.

Q. Did you not tell him that you would purchase one-half for him for another man?

A. I did not consider that I was told to furnish the money. Was not purchasing for Mr. Wenham: did not know that he would take a foot of ground.

Q. When he sent you \$500 in this letter here, "Yours of the 13th at hand. According to your wishes I enclose you \$500, payable to your order. This is a New York draft, and is as good as gold, * * in fact the banks prefer drafts to currency. Now if you will go quietly to work and not let the parties who want to sell get excited, when he agrees to sell give him the \$500 to bind the bargain." What was that fact, didn't you know Mr. Wenham wanted the claim?

A. He said he wanted an interest—

Q. Were you not negotiating with this Colorado party for the purchase the buying of the interest for Mr. Wenham?

A. No sir, I was writing to him about it; I proposed to offer it to him if he would pay for it.

Q. And the purpose of taking deed was to secure you for money advanced?

A. I suppose—

Q. Between the month of June, 1888, and April 1889, was there not a rise in values over there, the.....mine?

A. Yes Sir.

Q. And was not that the cause of your refusal to make this deal in 1889?

A. No Sir.

Objected to as immaterial. Objection overruled.—Ex.

Re-direct Examination, by Judge Nelson—

Q. Mr. Switzer, in the letter of April 23rd, 1888, in which Mr. Wenham encloses \$500 to you,—“If you do not want to use the money immediately you could make a special deposit in the bank till you needed it,”—what did you understand by Mr. Wenham’s directing you to make a special deposit of that \$500?

Objected to.

A. I put it in the bank in my own name.

Q. Did you do so?

A. No, because I was requested to pay out the money on a _____ that I would have to send to him.

Q. In this same letter he says: “Now if you go to work quietly, and not let the parties who want to sell get excited, when he agrees to sell give him the \$500 to bind the bargain.” Did you give him any \$500 to bind the bargain?

A. No. Took the deed and paid the money for the other half the same day I took the deed. Think I bought interest in May, some time in May: bought the other interest, and in June 5th offered to sell to Mr. Wenham.

Q. In buying this claim, one-half interest, did you use this \$500, or any of Mr. Wenham’s money in your hands?

A. I had the money on deposit there—that \$500 I put it in the bank.

Q. You kept that \$500 reserved for Mr. Wenham?

A. I had \$500 for Mr. Wenham; I don’t think I put it out. I did not put it in the bank as special deposit because I thought if I did I could not use it at all. Thought I might want to use it for Mr. Wenham—he was talking about buying an interest in the Sunlight claim; I did not know which he meant.

Q. Now, in your letter of June 5th, you say, “As I have received \$500 of you, so the balance, \$1,500, will make the purchase money of your part \$2,000.” Now you say you have received \$500: at the time of this letter, June 5th, 1888, where was this \$500 of Mr. Wenham’s?

A. In the draft. On June 5th, 1888, I think it was still in the draft; had not put it in the bank. According to my best recollection the \$500 was in the same shape in which I received it. I remember when I obtained a New York draft from the First National Bank of Butte for the purpose of returning it to Mr. Wenham—I don’t know as I can state the time. I think it was shortly after the suit was begun. Had at that time a draft in my possession for \$1000: kept that draft in the same shape I received it.

Q. Did you get the \$500 in the condition in which you paid it through me to Mr. Wenham?

A. I called upon Mr. Davis to give me a check on New York. I wanted to send a draft to New York.

Q. So that you are positive, are you, that you kept the \$500 in the same shape in which you received it until after you purchased the other half in the Burner Lode Claim?

A. I believe I had it in a draft some time after that.

That is all.

Witness excused.

Defense rests.

Mr. Wenham called in rebuttal testified as follows:

Examination by Mr. Smith—

Q. You may state to the Court whether or not you ever received any communication at all from Mr. Switzer in which he notified you that the money must be paid within a certain time?

A. Never received any such thing.

Q. Did you have any knowledge of the fact?

A. Not the slightest.

Q. Did you ever send him any money for any other purpose than for this?

A. Never except for that particular purpose. I remember the two drafts that were returned to me by Mr. Nelson; one was a \$500 draft, Butte City; signed, I think, by the First National Bank cashier of Butte City.

Q. Was it the same draft, \$500 draft, which you had sent to Mr. Switzer from Cleveland, Ohio?

A. It was not. No, sir.

That is all.

Cross-examination by Mr. Nelson—

Q. You have just stated that you never received any letter from Mr. Switzer in which he stipulated that this money must be paid within a certain time; if so, please state why it was that after he made you an offer in June 5th, 1888, of an undivided one-half interest in this claim, and you subsequently, as you state, have a strong impression, or to the best of your knowledge and belief you

wrote asking for further details, and that letter was written in June, 1888, some time you think, why you never remitted to him anything on account of the \$1500 until ten months after that time?

A. I will explain it to you. As Mr. Switzer was running the Monitor Tunnel at that time, and I had bought an interest with him through his agent, and at times he was sick, and we used to correspond right along. The time I wrote for survey, I expected a reply, but knowing Mr. Switzer was busy I let it run along until I began to think I was getting careless. I remitted him that \$1000 and asked him if he would——

Q. Did you not know at the time you remitted him that \$1000 he had specifically stated to you that \$1500 was necessary?

A. That is explained in the letter; I sent him this \$1000 on account and knew there was more than \$1500 due at the time, patenting, etc. It was sent on account. Mr. Switzer during that time was getting money from our people in Cleveland, running this tunnel, and I had every confidence in him. I admit it was very careless to leave it so long, to let it run on so long; I got no letter and no details ever came.

Q. But in the letter which you have filed here he stated he had \$500 still—leaving \$500 to do what he pleased with.

A. He had that \$500 a month or two or three months before he bought this claim. Paid other moneys. but not on account of that.

That is all.

Witness excused.

Exhibit 1.

BARGAIN AND SALE DEED.

This Indenture, made the day of in the year of our Lord one thousand, eight hundred and ninety, between William S. Switzer, of Silver Bow County, State of Montana, party of the first part, and A. A. Wenham, of the City of Cleveland, State of Ohio, party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of Fifteen Hundred Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns, forever, all of the following described property, situate, lying and

being in said Silver Bow county, State of Montana, and particularly bounded and described as follows, to-wit:

The undivided one-half (1/2) interest of, in and to the Burner quartz lode mining claim, the same being lot No. 258 in township three (3) north range seven (7) west, and being designated as survey No. 1774 and being bounded on the north by the Alta lode mining claim, and on the east by the Homestake quartz lode mining claim, and on the south by the Silver Crown quartz lode mining claim.

Hereby conveying all the right, title or interest which said party of the first part now has in or to said above described premises, and all the right, title or interest which said party of the first part may hereafter acquire to said premises by the issuance to him of a patent from the Government of the United States to said Burner Lode mining claim.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered
in presence of—

.....
.....
.....

Endorsed: *Bargain and Sale Deed.* Wm. S. Switzer to A. A. Wenham. Dated.....188.. Filed for Record
.....188.. at.....minutes past.....o'clock
.....M.County Recorder.
By.....Deputy.

Territory of Montana, }
County of Silver Bow, } ss.

I hereby certify that the within instrument was filed for record

in my office on the.....day of.....A. D. 188.,
 at.....min. past.....o'clock....M., and recorded at page
in book.....of.....Records of Silver Bow
 County, Montana Territory. Attest my hand and seal of said
 county.County Recorder.
 By.....Deputy. Filed May
 27th, 1892. Geo. W. Sproule, Clerk.

Exhibit No. 2.

This Indenture, made the.....day of.....in the
 year of our Lord, one thousand eight hundred and ninety between
 William S. Switzer of Silver Bow County, State of Montana, party
 of the first part and A. A. Wenham of the city of Cleveland, State
 of Ohio, party of the second part, witnesseth, that the said party of
 the first part for and in consideration of the sum of Two Thousand
 Dollars, lawful money of the United States, to him in hand paid by
 the said party of the second part, the receipt whereof is hereby
 acknowledged, does remise, release and forever quit-claim unto the
 said party of the second part, and to his heirs and assigns, the follow-
 ing described real estate, situated in the said County of Silver Bow
 and State of Montana, to-wit :

The undivided one-half interest of in and to the Burner quartz
 lode mining claim, the same being lot No. 258 in township three (3)
 north range seven (7) west, and being designated as survey No.
 1774, and being bounded on the north by the Alta quartz lode min-
 ing claim, and on the east by the Homesteake quartz lode mining
 claim, and on the south by the Silver Crown quartz lode mining
 claim, together with all the tenements, hereditaments and appurten-
 ances thereunto belonging, and the reversion and reversions, re-
 mainder and remainders, rents, issues and profits thereof: and also
 all the estate, right, title, interest of said party of the first part in and
 to said property, possession, claim and demand whatsoever as well
 in law as in equity of the said party of the first part, of, in or to the
 said premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises, with
 the appurtenances unto the said party of the second part, his heirs
 and assigns forever.

In witness whereof, the said party of the first part has hereunto
 set his hand and seal the day and year first above written.

Signed, sealed and delivered
in presence of

.....
.....

Endorsed:—*Quit-claim Deed*.....to
..... Territory of Montana, County of
..... ss. Filed for record.....
A. D. 188... at.....o'clock ...m. and recorded in book
.....of Deeds page.....Records of.....county,
Montana., County Recorder.
....., Deputy. Filed May 27th, 1892. Geo. W.
Sproule, Clerk.

Exhibit No. 3.

BUTTE CITY, M. T., Oct. 2, 1887.

Mr. A. A. Wenham:

DEAR SIR—Some time has passed since I directly heard from you. Mr. Pomeroy said he would keep you posted. The tunnel has during the past time has been moving steadily onward with good improvements inside and outside. Everything is running in Butte mining district with good results; one very rich mine has been opened by a St. Louis company lately during the past two months. This mine lays north of the Alice Co. was bonded by Joseph Clark for \$40,000.00 I presume from what I hear it can't be bought for \$500,000.00. Before it was opened it was considered but a good prospect: it lays west of our group of claims in the main center veins of the mother veins of this Great Mining Center. Dear Sir you can't imagine the great mines owned by the Great Anaconda Syndicate, all lying on this great mining zones of very large width up to I hear as wide as 100 feet wide. The Montana Union R. R. Road Main and switches so constructed as to shoot the ores into the 30 ton cars which one man can do. I think the Anaconda Co. has ten or eleven of these large mines; some of them lays about 4000 thousand feet West of our ground all within a mile and a half of our ground, some may be little farther, but all on the center of this great belt of these large zones mines. I believe we shall get good mines when we get further north more in the center of this mineral Belt while there I will have more depth. Depth is the main thing to gain here. The formation has been harder than I expected, but

of a good character. Now I am in granite; it may be all granite now though, but the veins which the surface indicates very much. The Railroad Company tunnel is in pure original granite of the best kind both ends of the tunnel, east and west side end; east end starts in on the fraction. I am running faster than last, month, running three shifts 8 hours per shift night and day excepting Sundays. Pay about fifty cents per foot for not running Sundays. Is this any disgrace to the Company? I think not. I have made considerable improvements on the outside. The mines are all surveyed for patents fast as time will permit. I believe the grounds are all good soon as tested which takes time; if anyone thinks I am not moving for the best they are wrongly posted or wrongly informed. Every unprejudiced one believes I shall get it good as soon as depth is acquired by getting under. I think now our ground North of the Monitor will be first rate as the rich developments north of the Alice and Moulton mines are so good. The straight lines North of the Monitor from the new strike will run North of the Monitor within three hundred feet as it plainly looks by the surface grounds. Mr. Wenham, I believe you will get twenty dollars to one in value when these mines are developed. Good mines are like good improved farms when improved they never will be worth less. Good mining grounds are very scarce in Montana. When they are bought up it cost money to get them and not a little at that for they are sure real estate. The Budd property got in a controversy with partners. Budd locked it up but for the reason it needs capital to pump and a quartz mill in the water, bottom of the tunnel plenty ore. The Major Budd mine is a good mine. I think a freeze out game is going on. I know more about the scheme than Budd does. I know what this mine is worth; he has bought another large prospect and is going to work it this coming winter season which Budd and one partner owns. The parties that bonded the Budd Mine advanced some money, and now want to litigate and freeze out so I privately hear of the matter.

Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta lode which I think can be got for \$1500.00 I wish you would let me know. Some time ago I bought one-half of it; it cost him about \$2000 thousand he is not a miner; the ground is a softer formation than where I am running our tunnel, and can be worked very easy its sloping towards the creek, and adjoining so the ores can be all run from it and all concentrated through our concentrator. It slopes North to our South line of the Alta while our grounds slopes south so sloping together its cheap I think, two large veins run lengthwise through it east and west, same course as ours and please let me know from now until Spring is the time to pick up property cheap, if you think a sale can be effected I will send you a copy or a plat of it as it lays adjoining our grounds the alta lode claim, then any one can come out or I will

get a deed of it in the bank and the exchange can be made either way, and I will get it cheap as any price can be had for it. Yours in confidence, William S. Switzer.

I think I shall get a vein soon I changed my crew of miners I am running stronger handed, I run a side drift for blasting purposes five or six hundred feet in a straight line tunnel is too far to operate blasting in the drift, my tramway is all finished first class work, I have built one building 36 by about 22 feet wide and builded up around the mouth of the tunnel so as to save all the room on the South side of the creek for building purposes, for a concentrator when necessary. I thought you would have come out before now, I would like to show you around the camp, and these great mines you cant believe all you hear in these papers but come and see how it is. My health is better, hope you are all well.

Verily yours

WILLIAM S. SWITZER.

The Hope mine is good ores ans.

Exhibit 4.

BUTTE CITY, Mar. 7th, '88.

Mr. A. J. Wenham & Sons, Cleveland, Ohio:

FRIEND WENHAM—Your favors of the past are thankfully rec. Having been somewhat afflicted and being gone from Butte, at times not having much to materally interest you, its possible you are better posted, than I could through the public press: we have had a fine winter season, yesterday received a snowfall of about 12 inches making good sleding, but moderate winter weather, times are reasonably good mining brisk, fair for this season of the year, the Anaconda is building larger also the Colusa. I have not done anything in relation to the Sunlight west, one of the owners as yet is away, but will be in this month. In relation to the claim I wrote you, the Colorado party owner was out, I think he will sell or will incorporate during this year. I am running steady night and day in the tunnel. Am in 700 feet I have crossed a large vein of 12 feet wide. A good mine, some ores copper, silver and good iron, this vein is on the north side of the New Emerald, its course north of east dips about ten degrees south, its a good one, a true fisure if it gains widening as it now shows under the hanging wall it will be fifty feet wide when it is fifty feet deeper than the tunnel, this makes our surface cropping report all true, more veins than reported on the surface: the railroad tunnel will be finished in about a month. I think the trains will run about the 1 of July, '88. I have large croppings of veins ahead of the tunnel, the papers are still trying to

blackmail us but we don't ask any favors of them, their reports are too thin I see by your Journal that many necessary improvements are being made or advised by the wise heads, they are like cutting a coat not knowing the size. I think you will do well to secure the interest I spoke of joining the Alta Claim, a fine group of six veins runs the whole length of the Alta, the veins are very large, but it needs more depth, but the location for developing is fine, let me hear from you as practicable.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27th. 1892. Geo. W. Sproule, Clerk.

Exhibit 5.

A. J. WENHAM'S SONS,

Wholesale Grocers,

138 Water, Cor. Frankfort St.

CLEVELAND, O., March 15, 1888.

Mr. Wm. S. Switzer, Butte City, Montana:

MY DEAR SIR:—Yours of the 7th at hand, and allow me to congratulate you on having cut so large a vein on the Emerald, and what is still better, a true fissure containing some iron, that I understand works easier at the mills when it contains iron. We must all acknowledge your good judgment in the manner of working and in selecting your ground. I hope the papers of Butte will get tired of trying to blackmail the Monitor soon. I heard a very fine compliment paid to your good judgment by Mr. W. A. Clark, the banker of your city: he said you used good sound judgment and had a good property. I did not think that sounded much like blackmail. So you see you have friends at home as well as abroad. I mail you the San Francisco Miner, with a piece marked in blue pencil, which may be of interest to you.

Now about the claim adjoining the Alta. I want to go in with you. Could the interest be bo't for \$1,000. Friend Whitney will be out to see you soon, I think. We could work the claim after the Monitor was well under way: I suppose you would be in no hurry to develop that claim till after the tunnel was complete. I hope you will be successful in getting the Sunlight west, if you think it is all right, as I suppose that could be worked very easily from the tunnel.

I see you are going faster in the tunnel, the formation must be softer to work. Hope to hear good news from the Sunlight East before long. With my best wishes for your early discovery, I remain,

Very truly yours,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 6.

A. J. WENHAM'S SONS,

Wholesale Grocers,

138 Water, Cor. Frankfort St.

CLEVELAND, O., Mch. 26, 1888.

Mr. Wm. S. Switzer, Butte City, Montana:

MY DEAR SIR—Yours of the 20th received to-day, I am glad to know you have such confidence in Mr. W. A. Clark, he must be a straight forward man in business.

How is the tunnel getting along, how long before we get news from the Sunlight lode. From the ideas I get you are about 100 feet or so from it yet. That claim ought to show up very fine since you have had such flattering prospects in the new Emerald. When you get into the Sunlight I shall try and come out and call on you and look around for a few days, if you get there before the weather gets too hot. Hope you will be able to secure the Sunlight West before it gets too late if you should get the claim adjoining the Alta all right, there is no hurry, as we could not work it for some time to come. I suppose we could sink a shaft on it to pay ore for about \$2000.00 & if we got the ore it would pay us well if the ore was rich enough, as transportation is so close at hand it would not cost us much to get the ore to the Mills. Hope you will soon get through with having blizzards out in Butte. We had one here about the first of the month which stopped all communication with N. Y. City either by rail or telegraph for about a week, the worst known in 50 years.

Hope to hear from Sunlight East before long. You must not

get out of patience with me if I am over anxious, hoping to hear from you favorably before long, I remain,

Very truly yours,

A. A. WENHAM.

Filed May 27, 1892, Geo. W. Sproule, Clerk.

Exhibit 7.

BUTTE CITY, Apr. 13th, '88.

Mr. A. A. Wenham, Cleveland Ohio:

DEAR SIR—Yours of the 26th and papers rec'd. I am thankful to receive your letter and papers which are very interesting to me, but we can't believe all we hear in public print, but all make mistakes.

I am driving ahead our tunnel running on three eight hour shifts with some more good results. I have drove through another 6 feet vein, containing copper 20 per cent and some silver, a good vein. I am in now 750 feet north of the tunnel door, formation very good with some water, am nearing on more water soon, and in relation to the west Sunlight it can't be had for less than 25000 dollars and five thousand dollars down, this is their decision after two months thinking, they offered to take 5000 thousand over a year ago, but they see what their property may be worth in the near future.

And in relation to the interest nearest the Alta it can't be had for less than about \$1500 dollars if it can be bought at any price, but I shall know in about twenty days and I will write you soon as I can get to know what I can let you have it for he may get excited and ask more; mining property is changing hands here now and a little anxiety shown now, but nothing surprising yet: what we expect is another road during this present ten months to come maybe: near Park Canyon somewhere we have a steam motor running from Butte to Meaderville every 15 minutes, and a horse street car from depot to Butte City. Mining is very brisk in Butte Country. My health is reasonably good. Hope you are well.

Verily yours,

WILLIAM S. SWITZER.

One thing more, if you conclude to take the interest you better send \$1500 dollars to the First National Bank of Butte as if you wait it may slip in others hands I am good for all you send to me.

Exhibit 8.

A. J. WENHAMS SONS,
Wholesale Grocers,
138 Water, Cor. Frankfort St.

CLEVELAND, O., Apr. 5, 1883. (8)

Mr. Wm. S. Switzer:

DEAR SIR:—I mail you to-day the Scientific Miner, in which I note that the West Granite people have struck it very rich, equally as good as the Granite Mountain people.

Mr. Pomeroy was here this week, and feels very well satisfied that he has about completed his contract with the reissuing of the 25,000, and expects to see you the last of April or first of May. I sincerely hope you will be able to secure the Sunlight West, as we want it if it is a possible thing, if you think it is all right. *How about the claim adjoining the Alta claim? Can you secure the ½ you spoke of? Let me hear from you soon as practicable.* How is the Monitor? Do you expect another vein soon?

Very truly yours,

A. A. WENHAM.

Filed May 27th, 1892. Geo. W. Sproule, Clerk.

 Exhibit 9.

A. J. WENHAM'S SONS,
Wholesale Grocers.

CLEVELAND, O., Apr. 23, 1888.

Mr. Wm. S. Switzer, Butte City, Mont.:

DEAR SIR:—Yours of the 13th at hand and contents noted. According to your wishes I enclose you \$500 payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city; in fact the banks prefer drafts to currency. Now if you go quietly to work and not let the party who wants to sell get excited, when he agrees to sell give him the \$500, to bind the bargain, and you can telegraph me for the other \$1,000, which I will send immediately on receipt of notice, and if you can't buy all of his interest buy half of it.

Do you think it possible to get the Sunlight on a bond for 18 months, and would it be possible to get underneath the Sunlight West inside of that time to take out ore enough to pay the bond at the expiration of that time. We could easily get them the \$5,000 down if we could get at the ore in the time named in the bond.

Please give us your opinion about the above, as your judgment we can fully rely upon. In regard to the claim next the Alta please keep it confidential until something is done: and by the way, what is the name of the claim?

Please answer soon as possible, that I may know you have received the money.

Very truly yours,

A. A. WENHAM.

P. S.—If you did not want to use the money immediately you could make a special deposit in the bank till you needed it.

A. A. W.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 10.

BUTTE CITY, M. T., Apr. 28th, '88.

Mr. A. A. Wenham, Cleveland, Ohio:

MY DEAR SIR—Yours of the 23rd '88 is received with one check of \$500 dollars on the First National Bank of Cleveland, Ohio, the mining lode claim is known as the Ontario or Burner lode mining claim: soon as I can hear from the party the matter will be concluded; the money is in Bank. In relation to the Sunlight West it will take some time before I can get any further move in the matter, when the parties get over their excitement then they will feel better; the tunnel matters are moving as usual; business is increasing. I hope you will prosper in your Arizona enterprise, it needs perseverance.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 11.

A. J. WENHAM'S SONS,
Wholesale Grocers.

CLEVELAND, O., May 26, 1888.

Mr. Wm. S. Switzer, Butte City:

MY DEAR SIR—Yours of April 28th at hand acknowledging receipt of check for \$500.00.

How are you progressing in the tunnel. Hope to hear of another cut before long. Can ore commence to be taken out of the 6 ft. vein soon as the Rail Road is completed across the new Emerald claim down to the city?

I hope to hear of you making some valuable strikes from now on in your tunnel as there certainly must be valuable ore under the Sunlight and Monitor claims from surface prospects. I suppose Mr. Pomeroy will be with you shortly and make you a visit as I have not heard any news for about a month.

Kindly give me what news there is if any about the tunnel and much oblige,
Very truly yours,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 12.

BUTTE CITY, M. T., June 5th, 1888.

Mr. A. A. Wenham, Cleveland, Ohio:

MY DEAR SIR—Your note with paper is received, glad to hear from you, the tunnel is moving on as usual I am in good sound granite have not crossed more veins yet: cut a side drift for blasting purposes, but am going ahead now, must get a vein soon, but sometimes the distance vary 10-20-15 or 30 feet before reaching the veins, if they don't move I shall drive through them when I get to them.

In relation to the Burner mining property I have got it all and paid for it, and surveyed it for patent but am doing one hundred dollars worth of work so as to have over \$600 dollars worth of work which will be a necessary improvement I am sure of two veins on the ground But it cost more than \$1500 it all cost me about \$4000 all told, but I was determined to have it if it cost more. It will pay to hold when patented. Property is rising in Park Canyon.

Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it at that; others would taking it at higher figures. Now friend A. A. Wenham send me \$1500 dollars and I will make you a deed of one undivided one half of the entire Burner property free of all work excepting the one hundred which I am now doing, which work will be over \$600 dollars sufficient to get the patent, then you will have to stand one half the expenses of the patent which only is the regular prices in this district and territory.

As I have received \$500 of you so the balance \$1500 will make the purchase money of your part \$2000 I will you more in detail next letter.

Everything in Butte is moving—

But I am sorry to note the great cave in the St. Lawrence mine Sunday about 12 o'clock noon the great timbering gave way, and they fell about 400 feet deep, and about 200 feet in length and caved in but Providentially as it was at changing, but one man is supposed lost one half hour sooner about 100 men would been lost.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 13.

A. J. WENHAM'S SONS,

Wholesale Grocers.

CLEVELAND, O., April 6, 1889.

Mr. Wm. S. Switzer, Butte City, Montana:

MY DEAR SIR:—Not having heard from you since some time last April or May, I have felt as though you had rather neglected my last letter written to you some time in the early part of June last. However, as you are the senior, I accept the situation. I enclose check on N. Y. for one thousand dollars. Please let me know how much you figured to be the balance. You now have fifteen hundred dollars in total from me (\$1,500.00.) I have thought it quite strange that I had not heard from you; however, I supposed you would write when you were ready. But as it was a matter of business, I thought it my duty to write to you now, as time was drawing close. I hope you are enjoying good health, and that your

tunnel is progressing as well as could be expected. I hope some day you may reap a rich harvest out of your enterprise. Still such enterprises and their results are only temporary. We can not take the results of our material labors with us, but our spiritual labor development we carry with us into an indefinite eternity.

Again wishing you the compliments and successes of the season, I remain yours very respectfully,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 14.

BUTTE CITY, M. T., May 30, 1889.

Mr. A. A. Wenham:

Your note of April 6th '89 containing one check of one thousand which I deposited in the First National Bank for safe keeping until you call for it, also your five hundred check is in Bank subject to your order; now the best investment I can make with the money for you is in the Monitor property which I think will be safe. By your request and Mr. C. W. Pomeroy's request I will make you a deed for 1500 shares of the Monitor, shares at one dollar per share. *I can't make you any deed to or in the Burner ground* nor can the West Sunlight be bought at any reasonable price, but its possible it can be bought within a year or two, I think the Monitor property is good, at the low price of \$100.

In relation to business in this country, copper and silver mining, everything is moving good, copper mining is and will be ahead in legitimate mining with more per cent in minerals or metal and more per cent money easier got than any mining business in the world: its consumption will increase hereafter all over the world, the developments in the Monitor tunnel has been and still is steady on night and day and will be finished long before Mr. Pomeroy thinks, providing he puts up the money very soon, which he tells me he will, but he is away behind his calculation, I presume he is doing best he can and between the veins I still have a good granite formation. But the veins are softer formation. I am spending more than I get on this Monitor tunnel deal getting nothing for my improvements, but its all right.

I think if Mr. Pomeroy sends me the money very soon that he said he would, I shall be able to finish the Monitor in about four months, unless the Monitor vein pitches north strong which in such

case will take me about one hundred feet further, as I am now in about one hundred feet from the tunnel door, no man can inspect this tunnel or go in this tunnel until finished.

Some new strikes are reported, now I have developed the outlines of things in relation to the Monitor tunnel soon as Mr. Pomeroy is heard from; I can give a still more encouraging report, but so far everything is good as can be expected, some men want things better than God made them but I am willing to take things as they are.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 15.

CLEVELAND, OHIO, June 4, 1888.

Friend Switzer:

Mr. C. C. Frost is in trouble and wants \$500 to carry on his suit; he is willing to give deed of his interest in Sunlight as security for the \$500 for 3 or 4 months the deed to be put on record: now friend Switzer if you think Mr. Frost can give a good deed as security and you think best and safe to loan him the money you can give him the \$500 *I have in your care* and I will send you more to take its place. I would get his note also his deed: is it necessary for his wife to sign the deed in Montana? have same put on *record*. Would it not be best for you to have your lawyer fix up the loan?

It would be much better to have Mr. Frost's *interest* in the hands of some one who has the interest of the tunnel at heart than to have an outsider get hold of it and make us trouble.

The money *I have with you might* as well be drawing interest. What is legal rate of interest in Montana? If anything should happen that Mr. Frost could not meet his obligations, his claims would not fall into strangers hands. Please let me know lawyers fees and I will remit on receipt of same, have the deed and note made in the name of Arthur A. Wenham, how is the tunnel progressing does the 13 ft. vein belong to the Company or to the Emerald Co. I think Mr. Pomeroy will see you very soon, hope you are getting along as well as you expect, let me hear from you as soon as you see Mr. Frost and oblige.

Yours very truly,

A. A. Wenham.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

CLEVELAND, OHIO, May 20, 1889.

Mr. W. S. Switzer, Butte City.

MY DEAR SIR—On Apl. 6th I sent you by registered letter \$1,000.00 to apply on my half of the Burner Lode Claim, together with the \$500 I advanced you some time ago, please let me know if you received the draft all right and the amount due you still, and I will remit you so you can mail me deed of same, please let me hear soon as possible so I may know that the draft arrived safely. I suppose you are very busy pushing the Monitor. I have not heard from it in so long I hardly know how you are progressing. I will try and visit you this summer early if possible, please let me hear from the tunnel and how it looks, hope you are enjoying good health.

What do you think of the copper market? Will it be apt to go much lower in price? I suppose it will be some time yet before the Monitor tunnel gets into the Monitor claim proper. Kindly give me the news from your mines and much oblige. I suppose your railroad accommodations are very good now since the new road is good in operation. Wishing you speedy success, I remain,

Yours very truly,

A. A. WENHAM.

Endorsed: P. Ex. 16. Filed May 27th, 1892. Geo. W. Sproule, Clerk.

 Deft. Exhibit 1.

HELENA, MONTANA, May 23, 1891.

A. A. Wenham, Esq., Cleveland, Ohio.

DEAR SIR—The case of A. A. Wenham vs. William S. Switzer having been dismissed in the U. S. Circuit Court for the District of Montana I herewith enclose to you Draft No. 139281 drawn by First National Bank of Cleveland, Ohio, upon Central National Bank, New York City, to your order and by you endorsed in blank, being the identical draft sent by you to William S. Switzer of Butte, Montana, in your letter to him dated Cleveland, Ohio, April 6th, 1889: and also Draft No. 114599 dated May 23d, 1891, drawn by the First National Bank of Butte on Clarke, Dodge & Co., New York City, in your favor for \$500.00 being return of that amount as

enclosed by you in letter from you to William S. Switzer of Butte, dated April 23d, 1888.

Please acknowledge receipt of enclosed drafts and oblige.

Yours truly,

A. H. Nelson, Counsel for Wm. S. Switzer.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

DRAFT.

The First National Bank of Cleveland.

\$1,000.00

Cleveland, Ohio, April 8th, 1889.

Pay to the order of *A. A. Wenham* One thousand Dollars.

The Central National Bank,
New York City.

Chas. H. Wilson,
Cashier.

No. 139281.

Endorsed: Pay W. S. Switzer, A. A. Wenham. William S. Switzer pay to the order of yourselves, Clarke, Dodge & Co., Apr. 16, 1892, for account of First National Bank, Butte City, Montana, Andrew J. Davis, Cashier. Clarke, Dodge & Co. For deposit only to credit of Clarke, Dodge & Co.

In the Circuit Court of the United States, for the Ninth Circuit,
District of Montana.

<p>A. A. Wenham, <i>Plaintiff</i>, vs. W. S. Switzer, <i>Defendant</i>.</p>	}	<p>Motion to make notes of Stenographer notes and minutes of the Court.</p>
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Comes now the plaintiff, A. A. Wenham, by his solicitors, and moves the Court to adopt and make as the notes and minutes of the Court on the trial of the above cause the evidence taken and reduced to writing by the Court Stenographer, Florence V. Selby, as the deeds offered in evidence by the plaintiff and filed with the Clerk of this Court, as plaintiff's exhibits 1 and 2. The evidence taken by said stenographer and reduced to longhand is hereto attached and made a part of this motion.

This June 26th, 1892.

SAMUEL WORD,
ROBERT B. SMITH,
AND R. L. WORD,

Solicitors and Attorneys for Plaintiff, A. A. Wenham.

Plaintiff in his bill of complaint charges that he and defendant entered into a contract by the terms and conditions of which it was agreed that plaintiff and defendant were to purchase the Burner lode claim, situate in Summit Valley Mining District, Silver Bow County, Montana; that the defendant had the sole management of the negotiations for the purchase of said property; that it was agreed that the same should be purchased for their joint benefit and each was to have an undivided half interest in the property; that defendant represented that said property would cost about three thousand dollars, and that the one-half interest which plaintiff would receive would cost about fifteen hundred dollars; the exact sum said property would cost not then being known; that plaintiff first advanced to defendant on account of said purchase the sum of five hundred dollars, which was so received by defendant, and subsequently the sum of one thousand dollars; that instead of purchasing said property for the joint benefit of plaintiff, the defendant purchased said property in his own name; that he represented to plaintiff that he paid therefor the sum of four thousand dollars, that plaintiff tendered to said defendant the balance of said purchase price, namely, five hundred dollars with interest up to the date of tender, and at the same time presented a deed to be signed by him to the one-half of said Burner lode, and demanded of him to deed the same to plaintiff, which he refused to do.

The defendant denies in his answer the alleged contract to purchase said lode for the joint benefit of himself and defendant; he admits that he received the five hundred dollars and the one thousand dollars from plaintiff, but denies that he received the same on account of the purchase of the Burner lode, or used either of said sums in that purchase. The negotiations for the purchase of an interest in the said Burner lode were carried on by letter. All of these letters except three are before me, and the contents of the missing letters were testified to on the trial before the court. Plaintiff, it appears, is a citizen of Cleveland, Ohio, and the defendant of Butte City, Montana.

Upon an examination of these letters I find the facts to be that on October 2d, 1887, defendant owned a one-half interest in the said Burner lode. On that date he wrote to plaintiff that he thought the other one-half could be bought for fifteen hundred dollars, and if plaintiff had a friend who desired this one-half of it to let him know; that the claim was a good one, and that he had bought and paid about two thousand dollars for the other half.

It appears from the evidence of plaintiff that he wrote to defendant in answer to his letter of October 2d, 1887, making some inquiry about the claim defendant had mentioned. On March 7th, 1888, defendant wrote to plaintiff: "I think you will do well to secure the interest I spoke of, adjoining the Alta claim."

From the evidence it sufficiently appears that this referred to the property in dispute. On March 15th, 1888, plaintiff wrote to defendant: "Now, about the claim adjoining the Alta, I want to go in with you. Could the interest be bought for \$1,000?" On April 5th, 1888, plaintiff wrote to defendant: "How about the claim adjoining the Alta claim: can you secure the one-half you spoke of? Let me hear from you soon as practicable."

On the 13th of April, 1888, defendant wrote plaintiff: "In relation to the interest nearest the Alta, it can't be had for less than about \$1500 if it can be bought at any price, but I will know in about twenty days, and I will write you as soon as I can get to know what I can let you have it for. He may get excited and ask more." In the same letter he says: "One thing more. If you conclude to take the interest, you had better send \$1500 to the First National Bank of Butte, as if you wait it may slip into other hands. I am good for all you send me."

On April 23d, 1888, plaintiff wrote to defendant: "Yours of the 13th at hand, and contents noted. According to your wishes, I enclose you \$500, payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city; in fact, the bankers prefer drafts to currency. Now, if you go quietly to work, and not let the party who wants to sell get excited, when he agrees to sell give him the \$500 to bind the bargain, and you can telegraph me for the other \$1,000, which I will send immediately upon receipt of notice, and if you can't buy all of his interest, buy half of it."

In answer to this the defendant wrote plaintiff: "My Dear Sir: Yours of the 23d, 1888, is received with one check of \$500 on the First National Bank of Cleveland, Ohio. The mining claim lode claim is known as the Ontario or Burner lode mining claim. Soon as I can hear from the party the matter will be concluded. The money is in the bank."

On June 4th, following, plaintiff wrote defendant a letter about loaning the money to one C. C. Frost, and he would replace it, but the money was not so disposed of.

On June 5th, 1888, defendant wrote plaintiff: "In relation to the Burner mining property, I have got it all and paid for it, and surveyed it for a patent. But am doing one hundred dollars worth of work so as to have over \$600.00 worth of work, which will be necessary improvement. I am sure of two veins in the ground, but it cost more than \$1,500.00. It all cost me about \$4,000.00, all told, but I was determined to have it, if it cost more. It will pay to hold when patented. Property is rising in Park Cayon. Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it

at that, others would have taken it at higher figures. Now friend A. A. Wenham, send me \$1,500.00 and I will make you a deed of one undivided half of the entire Burner property free of all work excepting the one hundred, which I am now doing, which will be over \$600.00, sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which only is the regular prices in this district and territory. As I have received \$500.00 of you, so the balance \$1,500.00 will make the purchase money of your part \$2,000.00. I will (write) you more in detail next letter."

Plaintiff in his evidence testifies, that he wrote a letter in answer to this, accepting defendant's offer, and asking for a more specific description of the property. Defendant denies that he ever received this letter.

Defendant in his evidence says, that soon after he wrote to plaintiff on June 5th, 1888, he wrote him another letter telling him he must pay the money to within a certain time. Plaintiff denies that he ever received this letter.

On April 6th, 1889, plaintiff wrote defendant asking for a plat, specifications and drawings, and enclosed him a New York draft for \$1,000.00. Asking him for amount of balance due him.

On May 30th, 1889, defendant wrote plaintiff: "Mr. A. A. Wenham, your note of April 6th, 1889, containing one check of one thousand (dollars) I deposited in the First National Bank for safe keeping until you call for it. Also your five hundred (dollar) check is in Bank subject to your order." Then there is an offer to invest this money in Monitor stock. Then this follows: "I can't make you any deed to or in the Burner ground."

It will be seen from a reading of the extracts that the transaction between plaintiff and defendant as set forth in the bill, is not correct. These extracts were taken from letters which treat principally of other matters, mostly about the tunnel on the Monitor lode. The understanding was that defendant should act as the agent for plaintiff in purchasing the one-half of the Burner lode. This was a voluntary undertaking, and it does not appear that plaintiff was to pay any or defendant to ask anything for this service. It was not an agreement by which plaintiff and defendant were jointly to purchase the Burner lode, or that in any sense the agreement was for a joint transaction. There is enough to show, perhaps, that plaintiff did authorize defendant to purchase a one-half interest in that lode for fifteen hundred dollars. But not for any more. When defendant informed plaintiff that he had better send him the fifteen hundred dollars with which to purchase the claim, plaintiff sends him five hundred dollars in a draft on a bank in which he seems to be connected, and informs him that he will

send the remaining one thousand when the purchase is made. In this there is no authority to purchase this interest in the Burner lode for any amount to exceed fifteen hundred dollars. Defendant could not bind plaintiff by any purchase of that lode which involved an expenditure of any sum to exceed that amount. An agent must pursue his authority strictly, and if he exceeds it he makes himself personally liable. As far as plaintiff is concerned, he was not bound by any purchase of that property for two thousand dollars. When defendant informed plaintiff that he had paid about two thousand dollars for the one-half of the Burner lode, and had taken the deed in his own name, and that he would deed to him the same on the payment to him, the defendant, of the two thousand dollars he had expended, plaintiff testified that he wrote to defendant telling him he would take the property, but asking also for plats, and specific descriptions thereof. Undoubtedly plaintiff had the right to ratify this act of his agent, but was the simple notification that he would take the property a sufficient ratification of that act? I think not.

He says he waited ten months, expecting these specifications and plats. What for? To see whether he would accept the proposition of defendant? It looks very much as if that might have been the motive. He says he accepted the proposition without receiving them. Why he should have waited ten months before sending any money on this accepted proposition is not very well explained. At the end of ten months plaintiff does not send to defendant the fifteen hundred dollars, which would be the balance of the purchase price of the property, but only one thousand dollars, and asks defendant to figure up the balance. Plaintiff testifies that he expected the representation work and expenses for obtaining a patent to be included in this balance. This was not the proposition of defendant. The proposition was that plaintiff was to pay two thousand dollars, and was to have a deed for one-half of the Burner lode. This was plain enough. There was no figuring to be done on the balance. It was plainly stated in his letter to him what amount plaintiff was to pay before receiving a deed. As defendant had undertaken to act as an agent for plaintiff, he was required to be loyal to his trust, and not act for himself. But I do not think he was required to wait indefinitely, to see whether plaintiff would ratify his action in paying two thousand dollars for the property. Plaintiff should have ratified the action of defendant within a reasonable time. Defendant says he wrote to plaintiff he must do this within thirty days. Plaintiff testified that he received no such letter, and the evidence of defendant on this point is not as clear as it might be. But whether he wrote such a letter or not, it appears to me the delay of about ten months in ratifying the action of defendant by plaintiff, as he should have done by paying to defendant the money he had expended, was unreasonable, and that defendant had the right to maintain that plaintiff had left him to shoulder the responsibility he had assumed.

and to treat the purchase as his own. There is no pretense but that defendant paid the full amount of two thousand dollars for the property.

Although it might be held that the position claimed on the trial of the cause is only an immaterial variation from the case presented in the bill, still I do not think plaintiff entitled to recover, even upon this assumed position.

The order of the Court is that the bill be dismissed, and defendant have judgment for his costs.

And thereafter, on the 27th day of June, 1892, the complainant herein filed his memorandum of exceptions, which said memorandum of exceptions, as filed and noted, is in the words and figures following, to-wit :

Circuit Court of the United States, Ninth Circuit, District of
Montana.

A. A. WENHAM, <i>Plaintiff</i> , vs. W. S. SWITZER, <i>Defendant</i> .	}	MEMORANDUM OF EXCEPTIONS.
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The plaintiff in the above cause excepts to the findings and decision of the Judge in his opinion, filed this June 27th, 1892, upon each of the following points :

Second. In deciding that the defendant's offer to purchase one-half ($\frac{1}{2}$) the Burner lode claim for plaintiff was a mere voluntary offer, and not binding upon the defendant.

Third. In deciding that defendant was not bound, as the agent of plaintiff, to convey the one-half of Burner Lode mining claim to the plaintiff.

Fourth. In deciding that the defendant did not act for the plaintiff in the purchase of one-half of the Burner Lode mining claim.

Fifth. In deciding that the plaintiff was not bound to take the one-half of the Burner Lode claim from the defendant after his purchase, and at the price of two thousand dollars.

Sixth. In deciding that plaintiff waited too long before tendering to defendant balance of purchase price.

Seventh. That the decision is against the weight of the evidence in said cause.

Eighth. That the decision is against and contrary to the law in said cause.

This June 27th, 1892.

SAMUEL WORD,
ROBERT B. SMITH,
AND R. L. WORD,
Solicitors for Plaintiff.

Exceptions noted.

HIRAM KNOWLES, Judge.

Endorsed: Title of Court and cause. Filed June 27th, 1892.

GEORGE W. SPROULE, Clerk.

And thereafter, to-wit, on the 30th day of June, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

On motion of Counsel for Complainant, Complainant granted thirty days from this date to prepare and file motion for new trial herein, and prepare and file Bill of Exceptions.

And thereafter on the 1st day of July, 1892, a final decree was filed and entered of record in this cause, which said final decree is in the words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

A. A. Wenham, <i>Plaintiff</i> ,	}	DECREE.
vs.		
William S. Switzer, <i>Defendant</i> .	}	

This cause came on to be heard at this term, and was argued by Counsel; and thereupon, upon consideration thereof, it was *ordered, adjudged and decreed* as follows:

It is by the Court *ordered, adjudged and decreed* that said complainant's bill herein be, and the same is hereby dismissed and that the defendant have and recover of and from the complainant his costs and disbursements herein, taxed at the sum of \$16.95.

HIRAM KNOWLES,
United States District Judge for the District of Montana sitting as
Judge of the U. S. Circuit Court for the District of Montana.

Decree filed and entered this 1st day of July, A. D. 1892.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit., on the 27th day of July, 1892, complainant filed his bill of exceptions herein, which said bill of exceptions, as allowed and signed, is in the words and figures following, to-wit :

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

A. A. Wenham, <i>Plaintiff</i> ,	}	BILL OF EXCEPTIONS.
vs.		
William S. Switzer, <i>Defendant</i> .		

Be It Remembered, That the above entitled cause having been regularly called for trial on May 26th, 1892, before the Hon. Hiram Knowles, District Judge, presiding and holding the above entitled Court, and the parties being present in person, and by their respective counsel and attorneys, and the evidence included in the minutes of the Court, and taken by the Stenographer of the Court in said cause, and which is filed in the office of the Clerk of said Court, and which is referred to herein, and made a part of this bill of exceptions, and said evidence being all the evidence in said cause, and the Court having heard the arguments of the attorneys, and the cause having been submitted to the Court for determination: and,

Be It Remembered, That thereafter, on June 27th, 1892, the Court rendered a decision in said cause, which decision is here referred to as a part hereof; and

Be It Remembered, further, That upon the rendition of said judgment, and upon the same day the plaintiff, by his attorney, filed with the Judge of the Court, and had allowed and preserved, the following exceptions to the decision of the Court, and the findings of fact and conclusions of law arrived at in said decision, and to errors excepted to at the time, to-wit :

First. The plaintiff excepts to that portion of the opinion wherein the Court finds that the defendant's offer to purchase one-half of Burner Lode for the plaintiff was a mere voluntary offer.

Second. In deciding that defendant was not bound as the agent of the plaintiff to convey the one-half of the Burner Lode mining claim to the plaintiff.

Third. In deciding that the defendant did not act for the plaintiff in the purchase of one-half of the Burner Lode mining claim.

Fourth. In deciding that the plaintiff was not bound to take the one-half of the Burner Lode claim from the defendant, after his purchase, and at the price of two thousand dollars.

Fifth. In deciding that the plaintiff waited too long before tendering to defendant the balance of the purchase price.

Sixth. That the decision is against the weight of the evidence in said cause.

Seventh. That the decision is against and contrary to the law in said cause.

All of which exceptions were filed with the Clerk of the Court on the 27th day of June, 1892, and signed and allowed by the Judge presiding, all of which plaintiff, by his counsel, prays may be certified and allowed in due form, which is accordingly done.

HIRAM KNOWLES,
Judge Presiding.

State of Montana, }
County of Lewis and Clarke. } ss.

Robert B. Smith, being duly sworn, on oath says that on July 26th, 1892, he left a copy of the foregoing bill of exceptions at the law office of A. H. Nelson, attorney for Defendant, said Nelson and said defendant both being absent from the county.

ROBERT B. SMITH.

Subscribed and sworn to before me this July 27th, 1892.

JNO. S. M. NEILL,
Notary Public.

Endorsements : No. 60; A. A. Wenham, Plaintiff, vs. Wm. S. Switzer, Defendant: Bill of Exceptions. Filed July 27th, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 22d day of September, 1892, the following further proceedings were had and entered of record in the words and figures following, to-wit :

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

Bill of Exceptions signed and allowed.

On motion of Counsel for Complainant, it is ordered that the notes of testimony as reduced to writing by the stenographer who

took the same be adopted as the notes and minutes of the Court in said cause.

Ordered that the motion of Complainant for a new trial herein, be, and the same hereby is, overruled.

And thereafter, to-wit: on the 17th day of December, 1892, the following further proceedings were had and entered of record herein; in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham vs. Wm. S. Switzer.

Petition for Appeal and Assignment of Errors filed, and thereupon appeal allowed in open Court; bond approved and citation issued.

Which said Petition for Appeal allowed thereof, assignment of errors and bond, are in the words and figures following:

In the United States Circuit Court, Ninth Circuit, for the
District of Montana.

Arthur A. Wenham, <i>Plaintiff</i> ,	}	<i>Petition for Appeal.</i>
vs.		
W. S. Switzer, <i>Defendant.</i>		

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Arther A. Wenham, the plaintiff in the above entitled action, by his attorneys and solicitors Messrs. Word, Smith and Word of Helena, Montana, files this, his petition on appeal, and complains that in the record and proceedings, and in the rendition of judgment and decree in the above entitled cause in the United States Circuit Court for the Ninth Circuit District of Montana, at the April term thereof, A. D. 1892, against your petitioner, Arthur A. Wenham, on the 27th day of June, and the first day of July, A. D. 1892, and from the order of the Court overruling plaintiff's motion for new trial made on the 22d day of September, A. D. 1892, manifest error has been committed, and hath intervened in said action to the great danger and injury of the said plaintiff Arthur A. Wenham.

Wherefore the said plaintiff, Arthur A. Wenham, prays that his appeal be allowed, and for such other process as may cause the

same to be corrected by the said United States Circuit Court of Appeals for the Ninth Circuit.

SAMUEL WORD,
ROBT. B. SMITH &
R. L. WORD,

Of Helena, Montana, Attorneys and Solicitors for Plff. A. A. Wenham.

Appeal Allowed.

HIRAM KNOWLES,

U. S. District Judge presiding.

Endorsements: No. 60. In United States Circuit Court, Ninth Circuit, District of Montana. A. A. Wenham, Plaintiff vs. W. S. Switzer, Defendant. Petition for Appeal: Filed Dec. 17, 1892. Geo. W. Sproule, Clerk. Word, Smith & Word, Attorneys for Plaintiff.

In the United States Circuit Court, Ninth Circuit, District of Montana.

Arthur A. Wenham, <i>Plaintiff</i> ,	} Assignment of Errors.
vs.	
William S. Switzer, <i>Defendant</i> .	

Now comes the plaintiff, Arthur A. Wenham, the Appellant in the above cause and says that in the records and proceedings in the above entitled cause in the said United States Circuit Court for the Ninth Circuit, District of Montana, there is manifest error to the plaintiff and appellant's injury and prejudice, as follows, to-wit:

I.

The Court erred in allowing the attorney for the defendant to ask the defendant leading questions as to whether or not the defendant wrote to the plaintiff, stating that the full amount due to the defendant from the plaintiff on account of the purchase of a one-half interest in the Burner lode claim should be paid within thirty (30) days from date of said letter, June, 1889.

II.

The Court erred in permitting the defendant to testify over objection of plaintiff as to the contents of a certain letter claimed to have been written in June, 1889, by defendant to plaintiff without first demanding the original of the plaintiff, and without first showing the impossibility of defendant to produce the original or a copy of the said original letter.

III.

The Court erred in deciding that the offer of the defendant to purchase for the plaintiff a one-half interest in the Burner lode mining claim was a mere voluntary offer, and binding on the defendant.

IV.

The Court erred in deciding that the plaintiff was not bound to take the one-half of the Burner lode claim from the defendant after his purchase, and at the price paid therefor by the defendant, to-wit, two thousand dollars.

V.

The Court erred in finding that the plaintiff waited too long after the purchase before tendering to the defendant the balance of the purchase price of the half interest in the Burner lode claim.

VI.

The Court erred in finding that the defendant had no authority from the plaintiff to pay more than fifteen hundred dollars for a one-half interest in the Burner lode Claim.

VII.

The Court erred in finding that the defendant ever wrote to the plaintiff or that plaintiff ever received at any time notice or a letter from the defendant that the balance of purchase price, to-wit, fifteen hundred dollars must be paid within thirty days.

VIII.

The Court erred in finding that there never was a ratification of the action of the defendant in purchasing the half interest in the Burner lode claim for two thousand dollars.

IX.

The Court erred in finding that the defendant after assuming to act for the plaintiff could waive his agency and keep the property for himself without first giving notice of such intention and tendering back the money received from the plaintiff.

X.

The Court erred in finding that the letter or notification sent

I hereby approve the above bond and the sufficiency of the sureties thereto.

HIRAM KNOWLES,

United States District Judge Presiding in Said Cause.

Endorsements : No. 60. In United States Circuit Court, Ninth Circuit. A. A. Wenham vs. W. S. Switzer, Defendant. Undertaking on Appeal. Filed December 17, 1892. George W. Sproule, Clerk.

United States of America, }
District of Montana. } ss.

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, Clerk of said Circuit Court, do hereby certify and return to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 112 pages, numbered consecutively from 1 to 112, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, testimony, exhibits and other proceedings in said cause, and of the whole thereof, as appear from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Helena, in the District of Montana, this 8th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[SEAL]

GEORGE W. SPROULE, Clerk.